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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

BERKEY PHOTO, INC.,

Petitioner,

against

EASTMAN KODAK COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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EASTMAN KODAK COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Berkey Photo, Inc. ("Berkey"), respectfully prays that a writ of certiorari issue to review the judgment and opinion entered on June 25, 1979 by the United States Court of Appeals for th Second Circuit in this cause.

Opinions Below

The opinion of the Court of Appeals is unofficially reported at 1979-1 Trade Cas. ¶ 62,718. The memorandum on post-trial motions of the District Court, Judge Marvin E. Frankel, dated June 16, 1978 and his opinion denying Eastman Kodak Company's ("Kodak") motion for a new trial dated August 8, 1978 are reported at 457 F. Supp. 404. These three opinions are reprinted in the separate appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals, reprinted in the separate appendix, was entered on June 25, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes Involved

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. The pertinent portions of these statutes are reprinted in the separate appendix to this petition.

Questions Presented

As the Court of Appeals observed, this case is "one of the largest and most significant private antitrust suits in history" (5a).[1] Its opinion purported to decide "important and novel issues concerning § 2 of the Sherman Act" (7a), noted that "[f]ew, if any cases have presented so many diverse and difficult problems of § 2 analysis" (14a), rejected *"Alcoa"*[2] in significant part (18a-20a) and reached results admittedly not supported by precedent (*e.g.*, 40a, 71a-73a). Verdicts of the jury (demanded by Kodak)—which the trial court endorsed—based on the stream of evidence and arguments adduced during an eight-month

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[1] "—— a" citations are to the separate appendix submitted herewith. "A ——" citations are to the parts of the record printed in the Joint Appendix to the Second Circuit. "E ——" citations are to exhibits printed in the Joint Appendix to the Second Circuit; "C ——" citations are to certain confidential exhibits printed in said appendix.

[2] *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

trial, were set aside by the Court of Appeals, which: (i) created enclaves of immunity from § 2 scrutiny for willfully exclusionary conduct, including the "leveraging" of monopoly power by "integrated" monopolists; (ii) substituted its view of the facts, assessed out of context, for the well-supported jury findings; (iii) promulgated an unprecedented rule for direct purchaser recovery of monopoly overcharges, which conflicts with the substantive basis for recovery and imposes requirements of proof which this Court has explicitly stated cannot be met and should not be attempted; and (iv) otherwise acted in conflict with important established principles of antitrust law. The questions presented are:

1. Should deliberately exclusionary conduct, including the leveraging of monopoly power into several relevant markets, be deemed *per se* lawful under § 2 of the Sherman Act because it was undertaken by a single vendor and was associated with product introduction?

2. May a jury be permitted to consider, in a § 2 case, a monopolist's rejection of less exclusionary courses of conduct, such as informing camera makers of an arbitrarily chosen film format,[3] prior to its introduction, where such timely disclosure would have involved no technological secrets about film or any information whatever about cameras and was solely a means of ameliorating the effects in the camera market of other deliberately exclusionary conduct?

3. Was it consistent with the Seventh Amendment and § 2 of the Sherman Act for the Court of Appeals to (a) substitute its view of the facts for the well supported find-

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[3] "Format" refers to the dimensions of the film strip and the cartridge in which it is contained. Cameras, almost without exception, are designed to use only one format. Illustratively, a 126 film format cannot be used in a 110 camera or vice versa (A 2622).

ings of the jury, concurred in by the trial judge, (b) ignore the market structure and the context, purpose and effect of the monopolist's conduct, and (c) determine that a persistent monopolist in the amateur camera market had not violated § 2, even though the record as a whole established and the jury found that its monopoly power was due to the intentional employment of exclusionary conduct, including violations of § 1 and leveraging of monopoly power in the film market to gain competitive advantages in the camera market?

4. Where persistent monopolization in violation of Section 2 of the Sherman Act has been found, may a direct purchaser of overpriced products recover damages measured by the difference between the monopolist's price and the price which would have prevailed in the absence of monopoly power found to have been unlawful, or is recovery limited, as the Court of Appeals ruled, to such "price increment" as can be shown to have been caused by "anticompetitive conduct that originated or augmented the monopolist's control over the market"?

5. Should the jury's verdicts have been sustained with respect to Berkey's photofinishing and photofinishing equipment damages and reinstated with respect to Berkey's 1971 camera losses, where the Court of Appeals recognized that there was sufficient evidence to support each such verdict, and referred to no error which affected the award?

Statement of the Case

A. Preliminary Statement

No issue is presented as to market definition or as to Kodak's monopoly power in the conventional (*i.e.*, non-instant) film, paper and camera markets here found to have been monopolized (17a-18a). Kodak's uniquely persistent and enormous market shares and profits in the

monopolized markets, reflective of monopolization, are summarized in Tables 1, 2 and 3 (pp. a1, a2, a3 hereof). These monopolies were illegally acquired and maintained and not "thrust upon"[4] Kodak, "economically inevitable"[5] or "a consequence of superior product, business acumen or historic accident."[6]

The jury found (182a-83a) that Kodak used its persistent power and approximately 90% market share in film,[7] in activities, including those associated with product introductions, to leverage its position and exclude competition in the camera and other markets.

Berkey was injured: (i) as a camera manufacturer, by the loss of sales and profits caused by Kodak's monopolization and attempted monopolization of that market, Kodak's use of its film monopoly to injure and destroy camera competition, and Kodak's violations of § 1 of the Sherman Act; (ii) as a photofinisher, by the loss of sales and profits and by overpaying Kodak for photofinishing equipment as a consequence of Kodak's misuse of its film monopoly; and (iii) as a direct purchaser of film and paper from Kodak,[8] by paying prices vastly in excess of those which would have prevailed in the absence of Kodak's unlawful monopolization of these markets.

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[4] *Alcoa, supra* at 429.

[5] *United States* v. *United Shoe Machinery Corp.*, 110 F.Supp. 295, 344 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). The trial court expressly observed that Kodak's camera monopoly "was a world away from being 'economically inevitable'" (111a).

[6] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

[7] The market where its return on investment has generally ranged at the extraordinarily high 60%-70% level (see *infra*, p. a2).

[8] From 1969 to 1977, Berkey purchased $75,324,000 of film and $46,029,000 of color paper from Kodak (E 2490, 2479).

Kodak's principal effort at exculpation with respect to the claims based on leveraging, associated with product introduction, was its argument that:

> "[A] company's introduction of a new product—though the company be a huge one like Kodak with monopoly power in a mosaic of interconnected markets, and though the introduction be designed deliberately to employ monopoly power in one market to create or enhance such power in another—must 'as a matter of law' be immune from attack under the antitrust laws." (105a).[9]

District Judge Frankel rejected such "formalistic line drawing" in favor of weighing "'all of the circumstances of a case' to determine whether a company has engaged in unlawfully anticompetitive practices. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)," and observed:

> "The court remains persuaded, however, that there is no such enclave for 'product introduction,' and that the mode, purpose, and impact of product introductions may, as in this case, play central parts in findings of unlawful monopolization and attempts to monopolize, no less than other, ordinarily lawful and 'normal' business activities like leasing rather than selling machinery, *United States* v. *United Shoe Machinery Co.*, 110 F.Supp. 295, 344 (D.Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954), the creation of useful resources for added productive capacity, *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 430-31 (2d Cir. 1945), or the discount offered on used equipment

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[9] See also A 1045-47, 1679, 1691, 1693-94, where Kodak argued for such a rule of *per se* lawfulness in connection with requests to charge and motions to dismiss, while refusing the invitation by the District Judge to propose any less extreme rule or standard by which its conduct could be tested.

and the adoption of separate charges for separate services condemned as exclusionary in *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 499-503 (9th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3453 (1978)." (105a).

The Court of Appeals, disregarding proof and findings as to the purpose and effect of Kodak's activities in the relevant context or market structure, in essence attributed *per se* validity to Kodak's leveraging, on the grounds that it merely represented one of the permissible competitive advantages of a multiproduct firm which the Court referred to as "an integrated business" (25a). Accordingly, it set aside the § 2 camera award to Berkey in the amount of $15,250,000 and dismissed the claims that Kodak monopolized and attempted to monopolize the camera market. The jury verdicts, predicated upon the claims that Kodak used its film monopoly to leverage its photofinishing and photofinishing equipment businesses, were also set aside.

Without questioning the evidentiary or legal sufficiency of the jury verdicts that Kodak unlawfully secured or maintained its monopolies in the film and paper markets, the Court of Appeals set aside Berkey's award for film and paper overcharges and remanded the claims for a new trial with respect to liability and damages. This determination was based on the Court's view that the jury was improperly permitted to award damages for overcharges measured by the difference between the prices actually charged and the prices which would have prevailed in the absence of unlawful monopolization. Instead, the Court enunciated the unprecedented rule that recovery for monopolistic overpricing is limited to a "price increment caused by the anticompetitive conduct that originated or augmented the monopolist's control over the market" (71a). It thus rejected a measure of damages based on Kodak's power to fix prices without regard to the influence of competition, which resulted from monopolization in vio-

lation of § 2. It mandated, instead, inquiry as to the impact of particular acts on pricing action, in a manner which this Court has heretofore observed cannot be done and should not be attempted (see *infra*, pp. 32-33).

B. Kodak's Persistent Domination and Manipulation of Amateur Photography

Kodak's present monopoly power, as its economist acknowledged at trial, cannot be divorced from its pattern of acquisition and destruction of competitors, tie-ins, refusals to deal, conspiracies in restraint of trade and other exclusionary conduct virtually eliminating competition[10] (E 1269-74, 1121-39; A 1748-49). Prior to 1954, when a consent decree in a government-instituted action[11] ended these and other practices, Kodak tied processing to color film sales and refused to sell monopolized color paper to others. This foreclosed entry by photofinishers and color film and paper manufacturers.

Kodak has at all times maintained its overwhelming dominance of the film and color paper markets so that photofinishers have been confined to equipment and procedures needed to process Kodak film and paper. Since ready access to photofinishing is essential to the convenient use of film (A 749-52, 787-90), only film "compatible" with Kodak film (i.e., film in the same format and capable of being processed with Kodak film) can be marketed successfully. Similarly, color papers of other manufacturers must be Kodak "compatible" (A 773-76, 1614-20).

A camera is useless without film which can be exposed in that camera, and then developed and printed. Since all manufacturers of film other than Kodak share only about

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[10] Certain of this conduct occurred prior to 1915 and was then adjudicated to be unlawful. *United States* v. *Eastman Kodak Co.*, 226 F. 62 (W.D.N.Y. 1915), *appeal dismissed*, 255 U.S. 578 (1921).

[11] *United States* v. *Eastman Kodak Co.*, 1954 Trade Cas. ¶ 67,920 (W.D.N.Y. 1954).

10 percent of the film market (p. a2, *infra*), Kodak alone can provide the wide availability of film needed to successfully market cameras using a distinct film format. The powerful brand differentiation in film associated with the Kodak name and monopolistic presence in the market further prevents the successful marketing of cameras for which Kodak film is not available. Aware of all of the foregoing, Kodak has consistently refused to make its film available for innovative cameras of others, with the explicit purpose of inhibiting the sale of non-Kodak cameras (A 964-65, 969-73, 1014; E 1813, 2162). As even the Court of Appeals (41a) and Kodak's economist (A 1740-41) conceded, Kodak has thereby prevented the successful introduction of any new camera format by any other camera maker.

C. Violations in the Camera Market

1. Proceedings in the District Court

a. Conspiracies in Violation of Section 1 of the Sherman Act

Kodak used its market dominance to extract from Sylvania and G.E. exclusive secret information, patent rights, promotional and marketing advantages and price preferences with respect to camera related flash lighting devices invented by these lamp companies. Kodak also conspired with Sylvania and G.E. to time the introduction of such lighting devices and, on occasion, to delay introduction, to correspond with Kodak marketing plans. It compelled the lamp companies, contrary to their explicit desires, to withhold from other camera manufacturers information which would have enabled them to compete on the merits with respect to cameras capable of cooperating with the flash inventions of Sylvania and G.E. As a result, when Sylvania introduced its flashcube in 1963, and its magicube in 1970, and G.E. introduced its flipflash in 1975, Kodak alone was in a position to offer cameras using these devices, while all other camera manufacturers were left with inventories

of obsoleted cameras and the need to hastily and inefficiently proceed with the design of cameras for the new flash lamps.[12] (123a-24a).

The jury determined that Kodak had conspired with Sylvania and G.E. in violation of § 1 of the Sherman Act (187a) and awarded damages, stated separately for 1970 and 1971 with respect to the magicube conspiracy (188a). Damages related to the Kodak-G.E. flipflash conspiracy were not separately determined.

In ruling on Kodak's post-trial motions, the District Judge described the Kodak-Sylvania conspiracy as "a restraint to be denounced under the rule of reason, and a form of exclusionary conduct supporting the findings of liability under Section 2" (123a). Judge Frankel upheld the 1970 damages, but set aside the 1971 damages because of the method of quantification (125a-26a).

b. Monopolization in Violation of Section 2 of the Sherman Act

Having succeeded, by anticompetitive means, in inhibiting the successful introduction by others of small pocketable cameras (*supra*, pp. 8-9), in March 1972, Kodak introduced the 110 system, consisting of (i) a small film format intended to obsolete existing industry standards; (ii) a new film, Kodacolor II, offered only in the 110 format;[13] (iii) a new system of photofinishing equipment and materials (available only from Kodak) required by the 110 format and associated Kodacolor II; and (iv) 110 format

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[12] Flashcube, magicube and flipflash were the only meaningful amateur conventional still camera flash introductions after the 1950's except for Everflash introduced by Berkey's Keystone division in 1970.

[13] Judge Frankel observed that the record supports a jury finding that Kodacolor II was confined to the 110 format for "anticompetitive purpose alone, not because of any technological or legitimately commercial concerns." (113a)

cameras which alone were able to use the new film or film format.

Kodak recognized that the 110 camera was merely one of many "cute little cameras . . . on the market," that "[t]here is nothing terribly novel about a new one, especially when it was bigger than most of the others" (E 1817) and that "[without] a new film, the program is not a new advertisable system" (E 1803). Accordingly, it launched the 110 system with a new film which it knew to be unnecessary and defective (E 830-33, 1766, 2109-10, 2082; A 1209-10) but nevertheless falsely promoted as a "remarkable new film" and the best film Kodak ever manufactured (E 2587-89, 2706-09; A 640).

As intended by Kodak, the 110 system sounded the "death knell" of existing camera formats (A 953; E 1519) and—despite Kodak's "lawyers worries about systems selling"—Kodak gained a "hammerlock" on the 110 system because "the new cartridge will fit only into our cameras" (E 2232).[14]

Responsible Kodak executives proposed that competing camera makers be informed of the configuration of the 110 film format prior to its introduction. Such disclosure would have preserved to Kodak its enormous film making profits, but would have ameliorated the anticompetitive effects in the camera market. Such "predisclosure" would *not* have included any information about Kodak camera plans or design or film technology, but would have been

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[14] The purposeful exclusionary nature of such systems selling was lucidly expressed in an August 1970 internal memorandum to Kodak's current chief executive officer from the coordinator of the 110 program, stating in material part as follows:

> "Kodak wants to sell a system, designs their products to fit into a system, and encourages their customers to think of photography as a system that Eastman Kodak Company is offering. Any marketing strategy which allows other manufacturers to introduce their products into this system context —particularly to serve large segments of the market—is a loss to the Eastman Kodak Company." (E 1307)

limited to information necessary for other manufacturers to independently design and manufacture cameras to be used with the new film format.[15] Kodak rejected such limited predisclosure in order to use its monopoly in the film market to deny other camera makers reasonable opportunity to compete on the merits with Kodak cameras.[16]

In upholding the jury's verdicts that Kodak monopolized and attempted to monopolize the camera market, the District Judge wrote, with respect to the foregoing events, that:

> "The paramount strategy and goal were thus to use the film monopoly . . . as a lever for suddenly swelling defendant's power in the camera market . . ." (104a).
>
> * * *
>
> ". . . the evidence tended powerfully to support plaintiff's theory of unlawful 'leveraging'. It is unnecessary to speculate whether plaintiff might have been entitled to a directed verdict on this score. It is sufficient to say that the evidence showed a carefully orchestrated program by defendant to use its film monopoly so as to obstruct and frustrate competition on the merits in the camera market" (109a).

Judge Frankel also concluded that it was appropriate to permit the jury to consider "predisclosure," and noted: (i) the sharply limited significance given to the matter in the

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[15] Belatedly, in January 1972, after a camera competitor threatened antitrust litigation, Kodak sold such limited information to camera makers (A 34-37).

[16] In a 1974 settlement of an antitrust action, Kodak again agreed to provide the limited disclosure here contemplated (E 2387-2407). Such information had previously been provided by Kodak in connection with the Super 8 movie format introduction in 1965 (A 974-77; E 920-23).

development of the case and in his charge;[17] (ii) the cautionary surrounding instructions, including a statement of the usual right to keep products secret; (iii) the context of facts which permitted the jury to "have found the 110 introduction a scheme contrived almost wholly to crush competitors;" and (iv) that the Sherman Act and the precedents required "a frequently subtle, inevitably comprehensive appraisal of actions by a company like Kodak wielding enormous monopoly power" (112a-115a).

2. Opinion of the Court of Appeals

The Court of Appeals affirmed the findings of § 1 violations (87a). The award of damages for 1970 was allowed to stand. The Court of Appeals found that the measure of damages used for 1971 was appropriate and reversed the District Judge's action in setting aside the 1971 damage award. However, instead of reinstating the jury's verdict, the Court of Appeals remanded for a new trial on damages. A new trial was also ordered to separately compute the damages resulting from the 1975 Kodak-G.E. flipflash conspiracy (101a).

The Court of Appeals reversed the § 2 findings, set aside the $15,250,000 awarded to Berkey for lost camera profits following the March 1972 110 system introduction and dismissed the § 2 camera claims.[18] Significantly, however, with the exception of a single reference to predisclosure in the charge on liability, the Court rejected all of Kodak's challenges to the relevant portions of Judge Frankel's charges to the jury (98a n. 72).

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[17] See A 265-66 as to the pertinent portions of the charge with respect to predisclosure.

[18] A new trial was not ordered with respect to the § 2 camera claims, as in the case of film and paper, even though the trial court precluded Berkey's reliance upon pre-1969 origins of the camera monopoly, which the appellate court, in discussing the film and paper monopolies, said was error (75a-76a).

The Court held that it was reversible error to allow the jury to consider the absence of predisclosure (37a-38a). The opinion failed to reflect the non-technical nature of predisclosure[19] and the limiting charge on the matter (see *supra*, pp. 11-13).

The Court characterized the exclusionary effects in the camera market of the simultaneous introduction of the 110 format, Kodacolor II in only the 110 size and the Kodak 110 cameras merely as "competitive advantages" flowing from the "broad based activities" of "any integrated firm" (25a). It erroneously assumed, despite clear and uncontroverted proof to the contrary, that any other film maker could have successfully introduced a new film format and cooperating line of cameras (40a)[20] and that 110 was primarily a camera development (41a).[21] It concluded that such activities could not constitute the use of monopoly power, but were solely the "benefit of integration" (40a) which in its novel view, as a matter of law, were immune from § 2 scrutiny. Its opinion does not mention the unequivocal factual findings by the jury and Judge Frankel (182a-183a, 105a-112a) that Kodak had used its monopoly power in film to gain competitive advantages in cameras. Although the Court of Appeals did note that Kodak, by refusing to make film available, had unlawfully prevented other camera manufacturers from competing by intro-

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[19] At certain points in its opinion (34a, 38a) the Court of Appeals recognized that the predisclosure here in issue was limited to information as to the 110 film format necessary to permit other camera manufacturers to independently design cameras to cooperate with film in this format. However, elsewhere the opinion ignores this limitation (35a, 36a), and at one point, erroneously and completely without support in the record, appears to assume that the disclosure contemplated details of Kodak's camera design which would enable others to copy Kodak cameras (31a).

[20] But see pp. 8-9, *supra*.

[21] But see p. 11, *supra*.

ducing cameras using new small formats, it viewed that anticompetitive conduct as irrelevant (41a-43a). Similarly treated as totally discrete conduct are the next described practices which the Court of Appeals recognized to be exclusionary and which were inextricably intertwined with the 110 scheme.

While the Court of Appeals recognized that the jury could readily have found that rushing the defective Kodacolor II film to market was an intentional and effective act of leveraging the monopoly power in film without any technological justification (46a-47a), it concluded that (a) there was no showing that the new film "coerced" purchases of 110 cameras and (b) it was not improper for Kodak to falsely promote the new film in order to enhance its camera sales (49a-51a).

The Court also acknowledged that Kodak may have violated § 2 by bringing out the allegedly superior and heavily promoted film in only the 110 format to leverage Kodak camera market dominance (51-52a). However, it reasoned that, since Berkey had not further extended this trial by locating and bringing in some undefined numbers of the "millions of amateur photographers" who bought the Kodak 110 camera in preference to a Berkey camera, in order to establish which of them acted solely as a result of the limitation of Kodacolor II to 110 film (54a), the jury could not have found injury due to that act alone (54a)—even though the Court of Appeals conceded that Kodak may have sold more 110 cameras by using and falsely promoting Kodacolor II in the 110 system (47a).[22]

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[22] Significantly, the Court raised no doubt as to the adequacy of proof of the fact of Berkey's injuries in considering the other aspects of Kodak's camera related conduct. See also the trial judge's observation that the proof of injury may well have merited a directed plaintiff's verdict (A 1671-72). Moreover, a requirement of such subjective proof of injury based on the views of

(footnote continued on following page)

The Court of Appeals repeatedly substituted its own view of the facts for the jury's well-supported findings and otherwise failed to weigh and consider in context: (i) the interrelationship among the above-considered aspects of the 110 program to which it specifically referred, and their relationship to other relevant acts and circumstances evidencing exclusionary purpose or effect; (ii) the proven anticompetitive intent and effect of Kodak's conduct; (iii) the nature and structure of the markets involved; (iv) the persistence of Kodak's monopoly in the camera market and the extent to which its domination of that market derived from its monopoly in the film market; (v) the significance of other exclusionary conduct, including the proven § 1 violations, which helps explain the origins of Kodak's camera market monopoly; and (vi) the lack of persuasive evidence that the camera monopoly was due to innovation or superior business acumen.

D. Section 2 Violations in the Photofinishing and Photofinishing Equipment Markets

The photofinishing of Kodacolor II in the 110 format required radically different processing equipment, materials and procedures from those of its predecessors. For a limited time after introduction, Kodak alone could offer processing for Kodacolor II or 110. Independent photo-

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(footnote continued from preceding page)

millions of individuals is wholly inconsistent with abundant controlling authorities. *See, e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 121 (1969); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 561 (1931); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 377 (1927); *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F.2d 709 (9th Cir.), *cert. denied*, 361 U.S. 961 (1959); *William H. Rankin Co.* v. *Associated Bill Posters of United States and Canada*, 42 F.2d 152 (2d Cir.), *cert. denied*, 282 U.S. 864 (1930).

finishers such as Berkey could enter the field only by purchasing overpriced and inefficient equipment and materials from Kodak. The jury explicitly found that Kodak had used its film monopoly to gain competitive advantage in the photofinishing and photofinishing equipment markets (183a). The trial judge referred to "unquestionably sufficient evidence, that defendant had used its film monopoly . . . to injure plaintiff as a photofinisher" (120a). He upheld damage awards for Berkey's lost profits as a photofinisher in the amount of $55,700 and for overcharges on the equipment in the amount of $19,000 and awarded equitable relief (144a-47a, 138a-40a; A 571-73).

The Court of Appeals recognized that Kodak had engaged in "shoddy treatment" (58a) of independent photofinishers and thereby gained competitive advantage, but held this not to be cognizable under the Sherman Act. It further observed that the evidence may have supported the jury's finding of leveraging in violation of § 2 (60a).[23] However, cryptically concluding that the instructions to the jury did not "draw with sufficient sharpness the distinction between exercises of power and the natural benefits of size and integration" (61a), it set aside the jury's verdicts and remanded the matters for a new trial.[24] The Court's determination did not depend on any denied request to charge or denied request for a special finding.

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[23] There is a manifest inconsistency between this observation and the Court's rulings that the jury erred in concluding that the Kodak film monopoly was used to leverage its position in the camera market and that the advantages that Kodak derived in the camera market from its film monopoly were "solely a benefit of integration" and therefore, *per se* lawful (*supra*, pp. 6-7, 14).

[24] A purported ambiguity in the instructions, just as any other claimed error in instructing the jury, can support a reversal only if specifically objected to below. *Griggs* v. *Firestone Tire & Rubber Co.*, 513 F.2d 851, 857 (8th Cir.), *cert. denied*, 423 U.S. 865 (1975); *Little* v. *Green*, 428 F.2d 1061, 1069-70 (5th Cir.), *cert. denied*, 400 U.S. 964 (1970).

E. Kodak's Monopolization of the Film and Paper Markets in Violation of Section 2 of the Sherman Act

1. Proceedings in the District Court

Berkey, as a direct purchaser of film and color paper from Kodak, proved the extent of Kodak's monopolistic overpricing by demonstrating what the pricing would have been in the absence of monopoly power found to have been unlawful.[25] Consistent with Kodak's position (A 1795) that the film pricing of others was the best point of reference for measuring overcharges,[26] the only theory of film damages which was permitted to go before the jury was based on all available proof of film sales and pricing by others. Analogous data were presented as to color paper and this was supplemented by a showing of Kodak's own price cuts in the face of incipient competition. Extensive evidence and argument were presented by Kodak to explain its price premium. The jury was instructed that it could award damages only to the extent that Kodak's higher prices were attributable to its unlawful monopolization (A 458-64), and that no damages were to be awarded to the extent that any price premium for Kodak film or paper "was in whole or in part accounted for by circumstances and conduct on Kodak's part that were lawful and permissible—such factors as higher quality, better marketing methods, superior service, customer preference, and other elements urged by the defendant" (A 461, 464).

The District Judge upheld the jury award of $11,500,000 in damages for excessive prices paid for film. He found,

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[25] Kodak's counsel conceded that "the film market . . . has been a market where there has not been price competition and where Kodak has been able to price its products pretty much without regard to the products of competitors" (11a).

[26] In view of the fact that Kodak has at all times since at least 1915 enjoyed monopoly share and power in the film market (E 1554, 1643), it was impossible to refer to actual experience of Kodak film pricing in a competitive climate.

however, that there was insufficient evidence of anticompetitive conduct during the limitations period to uphold the color paper award (138a). Accordingly, the paper award in the amount of $8,803,000 was set aside.

2. Opinion of the Court of Appeals

Recognizing "a dearth of cases on point", the Court of Appeals held that the measure of damages applied by this jury was erroneous, and that the proper measure of damages "is the price increment caused by the anticompetitive conduct that originated or augmented the monopolist's control over the market" (71a). The Court of Appeals acknowledged that the rule of damages which it enunciated —and which we respectfully submit is substantively inappropriate and procedurally unworkable (see Point IV, *infra*)—was novel (71a-73a) and "difficult" to apply (75a).

As noted (*supra*, p. 7), although the Court of Appeals found error prejudicial to Kodak only in the damage aspects of the film and paper claims, it reversed and remanded for a new trial on liability as well as damages (75a).

REASONS FOR GRANTING THE WRIT

I. Supreme Court guidance is urgently required so that the lower courts may know whether the avulsive changes in § 2 jurisprudence here applied by the Second Circuit should henceforth be applied in lieu of traditional standards which other circuits are following.

United States v. *Grinnell Corp.*, 384 U.S. 563 (1966), this Court's most recent opinion on § 2 of the Sherman Act, confirmed that the national policy embodied in that statute reflects a condemnation of the evils of persistent monopoly power and makes the possession of such power unlawful unless attributable solely to practices devoid of exclusion-

ary purposes or effects.[27] *Grinnell* was an affirmation of *Alcoa*,[28] which, along with *United Shoe Machinery*, continues to be the essential statement of the standards by which conduct related to the acquisition or maintenance of monopoly power is to be tested.[29] The District Judge applied these principles in the charge to the jury (108a) in a manner which was "if anything, more lenient toward Kodak than the stringent rule of *Alcoa*" (111a). Recently, the Ninth Circuit in *Greyhound Computer Corp.* v. *IBM Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); the District Court and the Third Circuit in *SmithKline Corp.* v. *Eli Lilly & Co.*, 427 F. Supp. 1089 (E.D.Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978); the Seventh Circuit in *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978); and the F.T.C. in *Borden, Inc.*, 3 Trade Reg. Rep. ¶21,490 at 21,504 (FTC 1978) reaffirmed these principles.

In setting aside the camera verdicts and exculpating a persistent[30] monopoly which was convincingly shown to be the product of deliberately exclusionary conduct, the Second Circuit has ignored the purpose or intent of acts which

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[27] *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 709 n. 14 (1962); *United States* v. *Griffith*, 334 U.S. 100 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946) (quoting at length from *Alcoa* and endorsing its essential teachings, 328 U.S. at 813); *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("Alcoa"); *United States* v. *Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to relief*, 384 U.S. 563 (1966); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D.Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

[28] L. Sullivan, *Handbook of the Law of Antitrust* 97 (1977).

[29] L. Sullivan, *supra* at 95.

[30] The January 1979 Report of the National Commission for Review of Antitrust Laws and Procedures observes (p. 156) that it is appropriate to presume that the possessor of persistent monopoly power has violated § 2.

enhanced Kodak's monopoly power, despite *Grinnell's* prohibition of "willfully secured or maintained monopoly power,"[31] and its own condemnation of monopoly power as "inherently evil" (17a) and unlawful if "coupled with the purpose or intent to exercise that power" (21a). It concluded that the *Grinnell* opinion had *sub silentio* abandoned *Alcoa's* "thrust upon" formulation (19a),[32] and elsewhere dismissed this seminal antitrust opinion as a "litigant's wishing well" (18a). Clearly, the Second Circuit acted in conflict with the well-recognized rule that § 2 liability does not depend upon proof of any unlawful or predatory conduct or act. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 498-99 (1968); *American Tobacco Co.* v. *United States, supra* at 809; *Greyhound Computer Corp.* v. *IBM Corp., supra* at 498; *United States* v. *United Shoe Machinery Corp., supra* at 345, where liability was predicated on conduct whose lawfulness had already been upheld, *see* 110 F. Supp. at 348 and *Hanover Shoe, supra* at 500.[33]

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[31] The importance of intent in antitrust litigation was again emphasized in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 n. 13 (1978), a § 1 case; *Sargent-Welch Scientific Co.* v. *Ventron Corp., supra* at 712, and *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1330 (5th Cir. 1976), recent § 2 cases.

[32] But see *Grinnell, supra,* 384 U.S. at 576 n. 7, where this Court explicitly declined to reach Judge Wyzanski's parallel position that the plaintiff's burden of proving monopolization is satisfied by a showing of persistent monopoly power.

[33] When, without the citation of authority, the Court of Appeals distinguished the exclusionary joint introduction of products by a monopolist from a *per se* illegal tie-in because of the absence of "coercion" (49a-50a), it also contravened the explicit holding of the Third Circuit in *SmithKline Corp.* v. *Eli Lilly & Co., supra,* 575 F.2d at 1061 n. 3; *see also* Austin, *The Individual Coercion Doctrine in Tie-Ins Analysis: Confusing and Irrelevant,* 65 Cal. L. Rev. 1143, 1176-80 (1977); Note, *Innovation Competition: Beyond Telex* v. *IBM,* 28 Stan. L. Rev. 285, 296-97 (1976); Comment, *Physical Tie-Ins as Antitrust Violations,* 1975 U. Ill. L. F. 224.

The continuing vitality of *Alcoa, American Tobacco* (and its approval of *Alcoa*), *United Shoe* and *Grinnell* and the application of their principles in *Greyhound, Borden* and the other cases above cited, have thus been squarely brought into question by this opinion. The ability of § 2 of the Sherman Act to deal with monopolization has been severely undermined. The threat to effective § 2 enforcement resulting from the Second Circuit's aberrational result will be particularly acute with respect to unilateral monopolization, as distinct from monopolization involving combination or acquisition, since this Court has heretofore provided so little express guidance on this issue,[34] which is of such critical importance to the further proceedings in this action[35] and numerous other cases of national moment now pending.[36]

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[34] In fact, this case appears to be the first private action tried to a jury so clearly presenting the issue. The question was presented and the paucity of this Court's guidance on the matter was noted in the Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit in *Telex Corp.* v. *IBM Corp.*, Doc. No. 74-1518 at pp. 26-30. That petition was withdrawn prior to a ruling by this Court.

[35] Particularly in the light of the Court of Appeals' determination that culpable conduct must be related to price increments in proving film and paper overcharge damages.

[36] *See GAF Corp.* v. *Eastman Kodak Co.*, 73 Civ. 1893 (S.D.N.Y.); *Pavelle Corp.* v. *Eastman Kodak Co.*, 73 Civ. 4126 (S.D.N.Y.); *Fotomat Corp.* v. *Eastman Kodak Co.*, 78 Civ. 351 (S.D.Cal.); and *Argus, Inc.* v. *Eastman Kodak Co.*, 79 Civ. 4525 (S.D.N.Y.), where further proceedings and jury trials are anticipated following the outcome of this case; *Greyhound Computer Corp* v. *IBM Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), remanding for jury trial in a decision which sharply conflicts, in principle at least, with the instant opinion of the Second Circuit; further proceedings, following hung juries after lengthy trials, are anticipated in *ILC Peripherals*

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The conflicts among the leading authorities which the Second Circuit referred to and created, and the important and novel questions regarding § 2 of the Sherman Act which that Court purported to resolve (7a, 14a, 19a, 40a, 71a-73a) by enunciating unprecedented doctrines so inimical to antitrust policy and enforcement, are matters which urgently require immediate consideration by this Court.

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Leasing Corp. v. *IBM Corp.*, 458 F. Supp. 423 (N.D.Cal. 1978) (*"Memorex"*) and *Transamerica Computer Corp.* v. *IBM Corp.*, 73 Civ. 1832 (N.D.Cal.), both involving claims of exclusionary product interface design and introduction to maintain and leverage monopoly power; *California Computer Products, Inc.* v. *IBM Corp.*, 1979-1 Trade Cas. ¶ 62,713 (9th Cir. 1979) involving, among other claims, the asertion that IBM used its main frame computer dominance to make design changes to exclude peripheral equipment manufacturers—rehearing *en banc* of the decision affirming a defendant's directed verdict has been sought and is deemed to be of sufficient moment by the Ninth Circuit to require briefing by the defendant; *SmithKline Corp.* v. *Eli Lilly & Co.*, where the application of the law as to § 2 liability differed radically from that of the Court of Appeals below (427 F. Supp. 1089 [E.D.Pa. 1976], *aff'd*, 575 F.2d 1056 [3d Cir.], *cert. denied*, 439 U.S. 838 [1978]) is currently being tried as to damages; *SCM Corp.* v. *Xerox Corp.*, 463 F. Supp. 983 (D. Conn. 1978), following a ten-month jury trial was certified by the Second Circuit on May 25, 1979 for interlocutory appeal under 28 U.S.C. § 1292(b), and involves the question of liability for damages resulting from monopoly power willfully acquired or maintained; and compare the amended complaint in *United States* v. *IBM Corp.*, 69 Civ. 200 (S.D.N.Y., filed Jan. 14, 1975), presently on trial and the complaint in *United States* v. *AT&T*, 74 Civ. 1698 (D.D.C., filed Nov. 20, 1974), both involving § 2 charges including allegations of misuse of monopoly power by multiproduct companies. *See also Purex Corp.* v. *Procter & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979), remanding for a jury trial in an opinion which sharply conflicts, in principle at least, with the opinion below as to the lawfulness of the use of the power of a multiproduct company.

II. The Court of Appeals raised important issues as to the roles of a jury and appellate review in complex cases by substituting its view of the facts for that of the jury and failing to assess the evidence as a whole.

In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Ninth Circuit had separately reviewed each of the matters relied on by an antitrust plaintiff and found none, standing alone, sufficient to sustain a finding of violations or injury. This Court reversed and observed that:

> "It is apparent . . . that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." 370 U.S. at 698-99.

See also Ohio-Sealy Mattress Manufacturing Co. v. *Sealy, Inc.*, 585 F.2d 821, 827-28 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 1267 (1979), rejecting reliance by defendant on the fact that each of its allegedly improper acts had been held lawful as "missing the mark" since the evidence must be viewed "as a whole"; *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 1979–2 Trade Cas. ¶ 62,770 at 78,418 (1st Cir. 1979); *Purex* v. *Procter & Gamble, supra* at 888; *Phillips* v. *Crown Central Petroleum Corp.*, 1979–2 Trade Cas. ¶ 62,743 at 78,210 (4th Cir. 1979); *United States* v. *Bottone*, 365 F.2d 389, 392 (2d Cir), *cert. denied*, 385 U.S. 974 (1966); *United States* v. *General Electric Co.*, 82 F. Supp. 753, 817 (D.N.J. 1949).

The Second Circuit's reversal of the § 2 camera claim verdicts because of its perception of the propriety of the acts of Kodak, each considered separately and out of context, plainly conflicts with the foregoing authorities. It is particularly inappropriate in lengthy and complex antitrust litigation where the intricacies of market structure, motive, intent and effect play such important roles and where, as here, the Court of Appeals found no error in the manner in which the trial was conducted before an experienced and able District Judge. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931); *Greyhound Computer Corp.* v. *IBM Corp.*, *supra* at 499. (See p. 13, *supra*).

Such a review of a jury verdict and the appellate court's factual assumptions in conflict with the verdict (see *supra*, pp. 14-15) also violate the Seventh Amendment limitations upon appellate reexamination of a jury verdict, *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962) and are alone an appropriate circumstance for the granting of certiorari. *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 30, 34-35 (1944).[37] The importance of early resolution of the issues here involved is fortified by the consideration of the roles of jury, trial judge and appellate courts in antitrust and other complex cases, such as was undertaken in *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1979-2 Trade Cas. ¶ 62,753 at 78,341-48 (E.D.Pa. 1979).

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[37] By rejecting the jury verdict, the Court of Appeals also failed to accord the opinions of the District Judge upholding the verdicts the deference due them by virtue of the fact that he "had conducted the original trial and had watched the case . . . unfold from day to day." *United States* v. *Johnson*, 327 U.S. 106, 112 (1946); *see Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 621 n. 20 (1974).

III. The Court of Appeals has erroneously created rules of *per se* legality under § 2 which conflict with applicable authorities and precluded consideration of less restrictive alternatives.

In no instance has this Court approved the classification of any conduct as *per se* lawful, and not subject to scrutiny by a finder of fact in light of its purposes and effects and all other relevant circumstances. *Cf. Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49 and nn. 15 and 16 (1977).[38]

In this case, however, absent an assessment of economic or social effects or detriment, the Court of Appeals has immunized as *per se* legal, conduct associated with product introduction, which, as next below demonstrated, has been recognized to be fraught with anticompetitive potential.

Leveraging by a monopolist in the manufacture of related products

It is firmly established, as the Court of Appeals recognizes (22a-24a), that a firm may not employ its monopoly power in one market to derive a competitive advantage in another market.[39] It was explicitly here found at trial that

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[38] This Court has repeatedly condemned classification of conduct as *per se* unlawful under the Sherman Act in the absence of the most compelling demonstration that it has a pernicious anticompetitive effect and lacks any redeeming virtue. *Broadcast Music Inc.* v. *Columbia Broadcasting System, Inc.*, 99 S.Ct. 1551 (1979); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, *supra* at 49-56; *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963); *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958).

[39] *See, e.g., Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *United States* v. *Griffith*, 334 U.S. 100 (1948); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927);

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Kodak had deliberately used its film monopoly to the injury of Berkey in the camera and other markets in a manner which Judge Frankel described as "a deliberate, anticompetitive mode of economic warfare rather than unobjectionable competition on the merits" (157a; see also 109a-12a).

The Court of Appeals, however, determined that deliberately exclusionary conduct, involving leveraging associated with simultaneous product introduction by a monopolist and a variety of other means of securing competitive advantages from presence in a variety of markets, is protected from § 2 scrutiny solely by virtue of the "integrated" nature of its business (25a).[40] No authority was cited to support the Court of Appeals' conclusions, and prior decisions preclude insulating such conduct from the analysis made in the trial court as to its purpose and effect.[41]

(footnote continued from preceding page)

SmithKline Corp. v. *Eli Lilly & Co., supra; Sargent-Welch Scientific Co.* v. *Ventron Corp., supra; Greyhound Computer Corp.* v. *IBM Corp., supra; City of Mishawaka, Indiana* v. *American Electric Power Co.*, 465 F. Supp. 1320 (N.D.Ind. 1979).

[40] The Court of Appeals' rejection of an inquiry as to the purpose or effect of the conduct here involved and its broad approval of a firm's enjoyment of the "competitive advantages" of integration cannot be reconciled with its suggestion that it was not adopting a *per se* rule for product introductions by such a firm (46a n.30), particularly when both Kodak and the District Court recognized that the adoption of such a rule was essential for Kodak to prevail (105a-08a). (See also pp. 6-7, *supra.*)

[41] *See Continental T.V., Inc.* v. *GTE Sylvania, Inc., supra* at 57 n. 26; *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 509 (1969); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 174 (1948); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *Purex* v. *Procter & Gamble Co., supra; Sargent-Welch Scientific Co.* v. *Ventron Corp., supra; Greyhound Computer Corp.* v. *IBM Corp. supra; SmithKline Corp.* v. *Eli Lilly & Co., supra; United States* v. *United Shoe Machinery Corp., supra* at 340.

In *United States* v. *Paramount Pictures, Inc., supra,* involving leveraging made possible by integration, this Court stated that the legality of the conduct employing the benefits of integration turned on such factors as the purposes with which it was conceived, the power it created and the attendant intent and effect. Following the teachings of *Alcoa,* the Court stated that such conduct of a vertically integrated enterprise would be unlawful if it encompassed a power to exclude competition and a purpose or intent to do so.

In *Fortner Enterprises, Inc.* v. *United States Steel Corp., supra,* this Court noted that while the advantages of integration alone are not condemned, this power in one market should not be used to exert economic power over other product lines that the company produces no more efficiently than its competitors. *Id.* at 509; *see also United States* v. *United Shoe Machinery Corp., supra* at 340, where the potential for the pernicious exclusion of competition inherent in the integrated monopolist was clearly recognized.[42]

The opinion of the Court of Appeals ignores the particularly apposite admonitions against the use of the

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[42] Commentators observe that integration presents anticompetitive potential and must be judged by no more permissive a standard than the rule of reason. O. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* 113 (1975); Blair and Kaserman, *Vertical Integration, Tying, and Antitrust Policy,* 68 Am. Econ. Rev. 397, 401 (1978); Kaserman, *Theories of Vertical Integration, Implications for Antitrust Policy,* 23 Antitrust Bull. 483, 507-09 (1978); *see* Kahn, *Standards for Antitrust Policy,* 67 Harv. L. Rev. 28, 44-46, 54 (1953); Levi, *A Two-Level Monopoly Law,* 47 Nw. U. L. Rev. 567, 583-84 (1952). Section 7 of the Clayton Act, of course, also, reflects an awareness of the anticompetitive potential of integration, *see Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962) and *F.T.C.* v. *Procter & Gamble Co.,* 386 U.S. 568 (1967). In *Purex* v. *Procter & Gamble Co., supra,* the Ninth Circuit recently commented upon the anticompetitive potential of certain conduct which was based on being a multiproduct firm.

powers of the integrated monopolist to disadvantage competitors and preclude competition on the merits. *See Fortner, supra,* and *United States* v. *United Shoe, supra*; Comanor, *Vertical Mergers, Market Power and the Antitrust Laws,* 57 Am. Econ. Rev. 254-265 (1967); Caves & Porter, *From Entry Barriers to Mobility Barriers: Conjectural Decisions and Contrived Deterrence to New Competitors,* 91 Q.J. Econ. 241, 246-47 (1977).

This Court should determine whether any true social advantages which may be found to inhere in the ability to operate as a multiproduct firm, without the restraints of § 2, and monopolize several separate markets, should outweigh the values reflected in the antitrust laws which have at all prior times mandated inquiry as to the purpose or effect of conduct by an integrated firm under a rule of reason test.

Predisclosure unrelated to technological advances or inventions but essential for preservation of competition

As earlier demonstrated, § 2 precedents require the consideration of all aspects of a monopolist's conduct in determining the lawfulness of its monopoly. Rather than excluding predisclosure from such appropriate consideration, *Response of Carolina, Inc.* v. *Leasco Response, Inc., supra* at 1330, alluded to by the Court of Appeals (41a), would find a violation where predisclosure was withheld and complementary products were shown to have been designed by a monopolist for exclusionary purposes "rather than to achieve some technologically beneficial result." In *Memorex, supra* at 437, the court found it significant that it did not appear that others "cannot compete with IBM" in the absence of predisclosure. Judge Frankel's instruction on predisclosure (A 265-66)—held faulty by the Court of Appeals—framed the very inquiry contemplated by *Memorex* and was, read in context with extensive surrounding caveats, consistent with *Response of Carolina, supra.* Moreover, the concerns expressed in *Memorex* as to the

right to protect technical secrets are not here apposite since the disclosure contemplated in this case did not relate to film technology or any aspect of camera design (*supra*, pp. 11-12).

The authorities which condemn monopolists who deny competitors access to an essential resource, *e.g.*, *Associated Press* v. *United States*, 326 U.S. 1 (1945) and *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), also establish that it was proper for the jury to have been permitted to consider whether Kodak's decision not to predisclose, in the light of other conduct determined to be anticompetitive, had a similar exclusionary effect.[43]

The manifest propriety of allowing the fact finder to consider whether the monopolist has employed "the least restrictive way of achieving [its] legitimate purpose", III P. Areeda & D. Turner, *Antitrust Law* 75-76 (1978), supports the consideration of predisclosure solely as a means of ameliorating the effects of anticompetitive conduct as was done in the District Court. As a recent law review article observed:

> "Allowing the jury to consider evidence indicating failure to predisclose was appropriate because the lack of predisclosure was merely one factor which established a course of unlawful monopoly conduct. The *Berkey* court's instructions suggest, however, that failure to predisclose by itself is not the type of conduct which infringes section 2." Note, *The Predisclosure Requirement*, 10 Rut.-Cam. L.J. 395, 421 (1979).

See also Comment, *Physical Tie-Ins as Antitrust Violations*, *supra* at 224, 235 (1975); Schwartz, *Berkey-Kodak Verdict No Cause for Panic*, N.Y.L.J., May 1, 1978 at 1.

Accordingly, Judge Frankel's charge on predisclosure and the jury's consideration of the matter were not im-

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[43] *Cf.* relevant portion of Judge Frankel's charge to the jury (A 265-66).

proper or validly the basis for reversal of the § 2 camera claim verdicts and the contrary conclusion of the Court of Appeals, arrived at without meaningful precedential support (40a), should be reviewed so as to avoid confusion on the matter which the opinion below has engendered.

IV. In deciding a question of first impression, the Court of Appeals ruled that, to recover damages, a direct purchaser of overpriced products from a monopolist must relate price movements to specific anticompetitive acts. This requirement is substantively unsound and would procedurally inhibit private damage actions and preclude recovery.

As early in the history of the Sherman Act as 1906, this Court upheld a recovery in a price fixing conspiracy for overcharges by a direct purchaser based on "the difference between the price paid and the market or fair price that the [plaintiff] would have had to pay under natural conditions" holding that "the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful [citation omitted] in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong." *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U.S. 390, 396, 397 (1906). In *Thomsen* v. *Cayser,* 243 U.S. 66 (1917), this Court reversed the Second Circuit and reinstated a jury verdict for overcharged customers, rejecting defendants' contention that it was not shown that plaintiffs were injured by the illegal combination. The Court stated:

> "[t]he plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess of over what was reasonable was an element of injury (citation omitted). The unrea-

> sonableness of the rate and to what extent unreasonable was submitted to the jury, and the verdict represented their conclusion." 243 U.S. at 88.

The claim that the jury considered "supposititious profits" was answered by the Court's observation that an admonition was given to the jury against speculation. Compare *Phillips* v. *Crown Central Petroleum Corp., supra* at 78,216, where very recently the Fourth Circuit applied these principles, and observed that in calculating damages the District Court was entitled to use what it perceived to be "the best approximation" of what the price would have been in the absence of the violation.

In *Hanover Shoe Inc.* v. *United Shoe Machinery Corp., supra*, a § 2 case, this Court followed the authorities first above cited (*id.* at 489-90), and upheld the right of a direct purchaser to recover from a monopolist the full amount of an overcharge.[44] The Court noted that "[n]ormally the impact of a single change in the relevant conditions cannot be measured after the fact," and recognized the difficulty of determining the impact of individual events on price movements "in the real economic world rather than an economist's hypothetical models." *Id.* The opinion states that if it were necessary to try to determine such hypothetical economic effects, "[t]reble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories" (*id.* at 493-94). Seeking to avoid such complexity or the undesirable results of allowing violators to "retain the fruits of their illegality," the Court reversed the judgment of the Court of Appeals to the extent it had set aside the District Court's computation of damages.

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[44] Judge Frankel also believed that price fixing principles and authorities were here controlling (see 129a-133a).

In *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 724-25 (1977), this Court restated the last mentioned concerns expressed in *Hanover Shoe;* quoted at length from the discussion in *Hanover Shoe* as to the unproductive burdens inherent in attempting to explain a company's pricing policy (*id.* at 725 n. 3); and cautioned against "the costs to the judicial system and the efficient enforcement of the antitrust laws" (*id.* at 732) of a rule which embroiled a trial in such an economic morass.

The above authorities reflect the fundamental tenet that private treble damage actions play a vital and salutary role in antitrust enforcement and should be encouraged. *See, e.g., Illinois Brick, supra* at 745 and pp. 35-36 *infra.* As stated in *Radovich* v. *NFL,* 352 U.S. 445, 454 (1957), the courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws."

Trial and appellate courts alike have been enjoined by this Court to:

> ". . . observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the

plaintiffs.' " *Zenith* v. *Hazeltine, supra,* 395 U.S. at 123-24.

Accordingly, any uncertainty as to the amount of damages is to be resolved against the wrongdoer. *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 251, 264-65 (1946). *See also Story Parchment Co.* v. *Paterson Parchment Paper Co., supra; Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359 (1927).

Although no prior decision has considered the method of quantifying damages of a direct purchaser from a monopolist, the rule of damages applied in the District Court for determining the film and paper overcharges is wholly in accord with the foregoing authorities. It was, as previously demonstrated (*supra,* p. 18), based on all relevant proof required to show the difference between the prices which would have prevailed in the absence of monopolization and the unconscionably high prices defendant was able to exact as a result of the wrongs which § 2 interdicted—*i.e.,* monopolization—the illegally obtained or maintained power to fix or establish prices. All proffered proof and argument which would permit the jury to assess the extent to which defendant's price premium derived from legitimate factors were received and the jury was specifically instructed to exclude from its award any element of Kodak's pricing attributable to lawful or permissible circumstances.[45]

The rule enunciated by the Court of Appeals would, on the other hand, base the damage award not on the inter-

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[45] At the prices for Kodak film and paper which would have prevailed in the absence of Kodak's monopolization of the markets, as reflected in the jury damage awards, Kodak's earnings on sales or return on investment would still have been in the extraordinarily high 30-40 percent range for film and 40-50 percent range for paper.

dicted, improperly acquired power to fix prices, but on individual acts, despite the fact that as that Court observed, § 2 is "aimed primarily not at improper conduct, but a pernicious market structure" (16a). Additionally, this formulation entails the staggering[46] tasks of proving and identifying all of the forces that influence the monopolist's pricing[47] and the individual effects of each, despite this Court's recognition that it cannot be done and should not be attempted.

CONCLUSION

The result below can only serve to undermine the private enforcement of the antitrust laws which this Court has declared to be essential to the preservation of competition. *Reiter* v. *Sonotone Corp.*, 99 S.Ct. 2326 (1979); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). Significantly, it was specifically because of a perceived threat to

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[46] The Court of Appeals observed (75a): "It may, of course, be difficult for a purchaser to demonstrate that conduct occurring many years before the commencement of suit contributed to an overcharge that it paid within the limitations period."

[47] If the views of the Court of Appeals prevail, it would behoove plaintiffs to prove all manner of a defendant's conduct, including that which is otherwise lawful or remote, that questionably was exclusionary, and it would be necessary for the trier of fact to determine each such claim. On the other hand, a comprehensive review of other conduct of defendant and competitors would presumably also be required to weigh the relative importance and quantitative significance of the exclusionary conduct. As a consequence, actions of this kind, which are now uncomfortably long, would be further extended.

"the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States" that certiorari was granted in *Perma Life, supra* at 136.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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TABLE 1

CAMERAS

The following are Kodak's camera sales, market shares, and profit data as set forth in the record:

Year	*Market Share* *Units %*	*$ %*	*Rate of Earnings from Operations to Sales %*	*Return on Investment %* *126*	*110*	*Sales $(000)*
1954	61	64				10,800
1955	67	69				12,200
1956	71	70				12,500
1957	66	73	16.8			15,000
1958	67	69	9.3			12,200
1959	69	75	16.8			16,000
1960	72	78	5.7			13,500
1961	65	77	15.7			13,800
1962	61	75	23.4			15,200
1963	65	85	26.0			25,500
1964	71	90	38.4			42,200
1965	80	87	44.6			50,600
1966	74	82	57.0			65,700
1967	71	75	49.1			68,500
1968	72	74	45.6			70,600
1969	73	75	44.7	74.4		71,600
1970	65	70	36.7	49.4		60,900
1971	70	72	42.0	72.2		67,100
1972	69	77	42.5	93.6	67.0	114,200
1973	74	79	44.2	85.6	92.3	141,900
1974	67	N.A.	40.7	59.1	55.0	102,000
1975	63	N.A.	36.5	46.2	41.3	
1976	53	N.A.				
SOURCE	E 1185	E 1185	C 213	C 214	C 214	E 1183

TABLE 2

FILM

The following are Kodak's film sales, market shares, and profit data as set forth in the record:

Year	*Market Share* *Units %*	*\$ %*	*Rate of Earnings from Operations to Sales %*	*Return on Investment %*	*Sales \$(000)*	*Earnings \$(000)*
1952	83	89				
1953	86	92			76,912	
1954	86	91			75,063	
1955	84	91			82,387	
1956	84	91			96,221	
1957	85	92			104,609	
1958	86	93			114,570	
1959	86	94			125,215	
1960	86	92			126,569	
1961	83	91			126,982	
1962	82	88			126,705	
1963	82	88			120,277	
1964	82	88	47.1	58.0	138,010	65,083
1965	85	90	51.6	64.9	167,479	86,466
1966	88	92	54.0	71.4	187,311	101,138
1967	91	93	55.0	71.6	222,817	122,450
1968	90	92	57.6	71.5	241,740	139,358
1969	89	92	56.3	64.9	246,413	138,597
1970	87	89	55.7	61.7	260,453	144,984
1971	87	89	59.4	63.5	269,826	160,281
1972	88	90	57.9	68.1	304,618	176,432
1973	87		55.6	63.3	317,419	176,456
1974	87		55.5	67.2	346,072	192,019
1975	86		56.3	66.7	383,613	216,080
1976			59.2		436,806	258,745
SOURCE	E 1286	E 1287	C 210	C 236-37	C 210	C 210

TABLE 3

COLOR PAPER

The following are Kodak's color paper sales, market shares, and profit data as set forth in the record:

Year	*Market Share* *Units %*	*$ %*	*Rate of Earnings from Operations to Sales %*	*Return on Investment %*	*Sales $(000)*	*Earnings $(000)*
1955			Neg.		14	—615
1956			—69.7		1,036	—722
1957			8.7		4,623	404
1958	85		28.1		8,993	2,529
1959	95		39.9		14,022	5,595
1960	95		40.9		16,450	6,727
1961	97		45.9		20,017	9,184
1962	99		52.9		23,601	12,494
1963	94		54.4		28,132	15,309
1964	97		55.1	49.6	35,812	19,739
1965	95		56.5	53.3	44,188	24,962
1966	98	100	57.6	58.1	57,923	33,378
1967	98	96	57.6	58.1	77,054	44,403
1968	94	94	58.9	59.9	98,772	58,181
1969	91	92	61.1	59.4	113,843	69,560
1970	91	91	60.7	55.2	123,592	74,984
1971	89	89	61.0	57.0	137,331	83,815
1972	86	87	63.0	66.0	164,576	103,723
1973	85	87	60.7	63.3	176,202	106,910
1974	76	78	58.3	68.4	190,146	110,949
1975	67	69	58.1	68.7	190,209	110,494
1976	60					
SOURCE	E 1289	E 1288	C 211	C 236-37	C 211	C 211

While the table indicates sales by others in the 1958-1966 period, it was clear that up to 1966 Kodak faced no cognizable competition and was generally considered to be the sole source of color print paper (A 796-97; E 1977).

79-427

Supreme Court, U. S.
FILED
SEP 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

BERKEY PHOTO, INC.,

Petitioner,

against

EASTMAN KODAK COMPANY,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of June, one thousand nine hundred and seventy-nine.

Present: HON. IRVING R. KAUFMAN
Chief Judge

HON. J. JOSEPH SMITH
HON. WILLIAM H. MULLIGAN
Circuit Judges

78-7445
78-7448

BERKEY PHOTO, INC.,

Plaintiff-Appellee-Cross-Appellant,

v.

EASTMAN KODAK COMPANY,

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Appendix A—Judgment of the Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in part and reversed in part and the action be and it hereby is remanded to said District Court without costs in accordance with the opinion of this court.

A. Daniel Fusaro,
Clerk

Arthur Heller
By: Arthur Heller,
Deputy Clerk

APPENDIX B

Opinion of the Court of Appeals (filed June 25, 1979)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1019, 1070—August Term, 1978.

(Argued April 18, 1979
finally submitted April 30, 1979 Decided June 25, 1979.)

Docket Nos. 78-7445, 78-7448

BERKEY PHOTO, INC.,

Plaintiff-Appellee-Cross Appellant,

-v.-

EASTMAN KODAK COMPANY,

Defendant-Appellant-Cross Appellee.

Before:

KAUFMAN, *Chief Judge,*
SMITH and MULLIGAN, *Circuit Judges.*

Appeal and cross-appeal from a judgment of the United States District Court for the Southern District of New York, Marvin E. Frankel, *District Judge.* The district court upheld certain jury verdicts in this private antitrust action; set aside others; entered judgment for plaintiff in

the amount of $87,091,309.47, comprising attorneys' fees, costs, and treble damages; and decreed certain equitable relief.

Affirmed in part, reversed in part, and remanded for further proceedings.

ALVIN M. STEIN, New York City (Barry J. Brett, Mark I. Schlesinger, Aurora Cassirer, Mark D. Offen, Parker Chapin Flattau & Klimpl, New York City; Neuman, Williams, Anderson & Olson, Chicago, of counsel), *for Plaintiff-Appellee-Cross Appellant.*

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KAUFMAN, *Chief Judge*:

INTRODUCTION

To millions of Americans, the name Kodak is virtually synonymous with photography. Founded over a century ago by George Eastman, the Eastman Kodak Company has long been the preeminent firm in the amateur photographic industry. It provides products and services covering every step in the creation of an enduring photo-

graphic record from an evanescent image. Snapshots may be taken with a Kodak camera on Kodak film, developed by Kodak's Color Print and Processing Laboratories, and printed on Kodak photographic paper. The firm has rivals at each stage of this process, but in many of them it stands, and has long stood, dominant. It is one of the giants of American enterprise, with international sales of nearly $6 billion in 1977 and pre-tax profits in excess of $1.2 billion.

This action, one of the largest and most significant private antitrust suits in history, was brought by Berkey Photo, Inc., a far smaller but still prominent participant in the industry. Berkey competes with Kodak in providing photofinishing services—the conversion of exposed film into finished prints, slides, or movies. Until 1978, Berkey sold cameras as well. It does not manufacture film, but it does purchase Kodak film for resale to its customers, and it also buys photofinishing equipment and supplies, including color print paper, from Kodak.

The two firms thus stand in a complex, multifaceted relationship, for Kodak has been Berkey's competitor in some markets and its supplier in others. In this action, Berkey claims that every aspect of the association has been infected by Kodak's monopoly power in the film, color print paper, and camera markets, willfully acquired, maintained, and exercised in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. It also charges that Kodak conspired with flashlamp manufacturers in violation of § 1 of the Act, 15 U.S.C. § 1. Berkey alleges that these violations caused it to lose sales in the camera and photofinishing markets and to pay excessive prices to Kodak for film, color print paper, and photofinishing equipment.[1]

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[1] Berkey had charged several other violations that are not before us on this appeal. During the liability trial, Berkey with-

(footnote continued on following page)

A number of the charges arise from Kodak's 1972 introduction of the 110 photographic system, featuring a "Pocket Instamatic" camera and a new color print film, Kodacolor II, but the case is not limited to that episode. It embraces many of Kodak's activities for the last decade and, indeed, from preceding years as well.

After more than four years of pretrial maneuvering, the trial got under way in July 1977 before Judge Marvin E. Frankel of the Southern District of New York. Despite the daunting complexity of the case—the exhibits numbered in the thousands—Kodak demanded a jury. Accordingly, the trial was conducted in two parts, one to determine liability and the other to measure damages. It ran continuously, except for a one-month hiatus between the two segments, until the final verdict was rendered on March 22, 1978. The liability phase of the trial by itself consumed more than six months, and the damages aspect required approximately another month. Except for a few specific questions relating primarily to market definitions, the jury was asked to render what was essentially a general verdict on each count.

After deliberating for eight days on liability and five on damages, the jury found for Berkey on virtually every point, awarding damages totalling $37,620,130. Judge

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(footnote continued from preceding page)

drew or the court dismissed claims under the Clayton Act §§ 3 & 7, 15 U.S.C. §§ 14 & 18, as well as allegations arising from some of Kodak's early acquisitions, its use of patents, its relations with Polaroid Corp., and its other activities in the instant photography field. Despite jury findings of § 2 liability, Berkey did not attempt to prove damages with respect to color negative printers and chemicals, and the jury found no damages with respect to amateur movie cameras. Kodak's purchases of flashcubes, magicubes, and flipflash arrays led to a $245,100 jury verdict under the Robinson-Patman Act, § 2(f), 15 U.S.C. § 13(f), which was set aside by Judge Frankel because there was no evidence of injury to Berkey.

Frankel upheld verdicts aggregating $27,154,700 for lost camera and photofinishing sales and for excessive prices on film and photofinishing equipment, but he entered judgment n.o.v. for Kodak on the remainder. Trebled and supplemented by attorneys' fees and costs pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, Berkey's judgment reached a grand total of $87,091,309.47, with interest, of course, continuing to accrue.

Kodak now appeals this judgment, as well as the two forms of equitable relief that we shall discuss below. It challenges virtually every aspect of the district court proceedings, from the theories of liability and damages presented to the jury to the sufficiency of the evidence to sustain them. It argues, furthermore, that Judge Frankel committed prejudicial error in the conduct of the trial. For its part, Berkey contends that the trial judge erred in not entering judgment on the full amount of the jury's verdict and in computing improperly the costs and fees that Berkey should recover.

Resolution of these competing claims requires us to settle a number of important and novel issues concerning § 2 of the Sherman Act. We believe that the district court committed several significant errors as it charted its course through the complexities of this case, and we are therefore compelled to reverse the judgment below in certain major respects. But we cannot accept Kodak's contention that a properly charged jury could not find monopolization of any of the relevant markets and resulting damage to Berkey. Accordingly, we remand for a new trial on several of the claims.

I. The Amateur Photographic Industry

Before plunging into the welter of issues raised in this appeal, we must understand the industry out of which the

litigation arose. It is, of course, a basic principle in the law of monopolization that the first step in a court's analysis must be a definition of the relevant markets. *See, e.g., United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-93 (1956). Although Kodak does not now challenge the jury's delineation of the markets a survey of this terrain remains essential. The jury found monopolization or other anticompetitive conduct in no fewer than five distinct markets within the amateur photographic industry, and in several instances Kodak was held to have misused its control over one market to disadvantage rivals in another. Accordingly, to evaluate the verdicts, it is necessary to describe not only the individual markets but also the interrelationships among them.

The principal markets relevant here, each nationwide in scope, are amateur conventional still cameras, conventional photographic film, photofinishing services, photofinishing equipment, and color print paper. The numerous technological interactions among the products and services constituting these markets are manifest. To take an obvious example, not only are both camera and film required to produce a snapshot, but the two must be in compatible "formats." This means that the film must be cut to the right size and spooled in a roll or cartridge that will fit the camera mechanism. Berkey charges that Kodak refused to supply on economical terms film usable with camera formats designed by other manufacturers, thereby exploiting its film monopoly to obstruct its rivals in the camera market. Similarly, Berkey contends, since the emulsions and other constituents of a film determine the chemicals and processes required to develop it, Kodak was able to project its power over film into the photofinishing market as well.

These and other market interactions will be discussed in depth as we analyze the verdicts and rulings below.

First, however, we must describe in detail the individual markets themselves.

A. *The Camera Market*

The "amateur conventional still camera" market now consists almost entirely of the so-called 110 and 126 instant-loading cameras. These are the direct descendants of the popular "box" cameras, the best-known of which was Kodak's so-called "Brownie." Small, simple, and relatively inexpensive, cameras of this type are designed for the mass market rather than for the serious photographer.[2]

Kodak has long been the dominant firm in the market thus defined. Between 1954 and 1973 it never enjoyed less than 61% of the annual unit sales, nor less than 64% of the dollar volume, and in the peak year of 1964, Kodak cameras accounted for 90% of market revenues. Much of this success is no doubt due to the firm's history of innovation. In 1963 Kodak first marketed the 126 "Instamatic" instant-loading camera,[3] and in 1972 it came out with the much smaller 110 "Pocket Instamatic." Not only are these cameras small and light, but they employ film packaged in cartridges that can simply be dropped in the back of the camera, thus obviating the need to load and position a roll manually. Their introduction triggered successive revolutions in the industry. Annual amateur still camera sales in the United States averaged 3.9 mil-

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[2] More complicated cameras, such as those in the 135 format ("35-millimeter") commonly used by professionals and photographic hobbyists, were found not to be part of this market. The jury also rejected Kodak's request to include in the definition "instant" cameras, pioneered by the Polaroid Corporation, which produce a finished print within minutes, or even seconds, after the shutter is snapped.

[3] Instant-loading cameras are not to be confused with the "instant" cameras referred to in the previous footnote.

lion units between 1954 and 1963, with little annual variation. In the first full year after Kodak's introduction of the 126, industry sales leaped 22%, and they took an even larger quantum jump when the 110 came to market. Other camera manufacturers, including Berkey, copied both these inventions, but for several months after each introduction anyone desiring to purchase a camera in the new format was perforce remitted to Kodak.

Berkey has been a camera manufacturer since its 1966 acquisition of the Keystone Camera Company, a producer of movie cameras and equipment.[4] In 1968 Berkey began to sell amateur still cameras made by other firms, and the following year the Keystone Division commenced manufacturing such cameras itself. From 1970 to 1977, Berkey accounted for 8.2% of the sales in the camera market in the United States,[5] reaching a peak of 10.2% in 1976. In 1978, Berkey sold its camera division and thus abandoned this market.

B. *The Film Market*

The relevant market for photographic film comprises color print, color slide, color movie, and black-and-white film.[6] Kodak's grip on this market is even stronger than its hold on cameras. Since 1952, its annual sales have

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[4] In 1967 Berkey acquired a manufacturer of amateur photographic accessories, the Atlas-Warner Corp., along with three distributors of Atlas-Warner products.

[5] Berkey entered into the manufacture of instant cameras in 1972, but discontinued this line in settlement of patent litigation instituted by Polaroid Corp.

[6] The jury included movie film and 35-millimeter film in this market, presumably because they are substantially identical to the film used in amateur still cameras. Instant film, however, a product chemically distinct from laboratory-processed film, was excluded.

always exceeded 82% of the nationwide volume on a unit basis, and 88% in revenues. Foreign competition has recently made some inroads into Kodak's monopoly, but the Rochester firm concedes that it dominated film sales throughout the period relevant to this case. Indeed, in his summation, Kodak's trial counsel told the jury that "the film market . . . has been a market where there has not been price competition and where Kodak has been able to price its products pretty much without regard to the products of competitors."

Kodak's monopoly in the film market is particularly important to this case, because the jury accepted Berkey's contention, noted above, that it had been used to disadvantage rivals in cameras, photofinishing, photofinishing equipment, and other markets. Of special relevance to this finding is the color print film segment of the industry, which Kodak has dominated since it introduced "Kodacolor," the first amateur color print film, in 1942.[7] In 1963, when Kodak announced the 126 Instamatic camera, it also brought out a new, faster color print film—Kodacolor X—which was initially available to amateur photographers only in the 126 format.[8] Nine years later, Kodak repeated this pattern with the simultaneous introduction of the 110 Pocket Instamatic and Kodacolor II film. For more than a year, Kodacolor II was made only

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[7] Kodak marketed improved versions of Kodacolor in 1945, 1949, and 1955.

[8] The new film was also initially sold for use in 35-millimeter cameras, which are not part of the amateur market. It did not replace Kodacolor in the amateur 127 and 620 sizes until one year later. "Film speed" refers to an emulsion's sensitivity to light. Thus Kodacolor X—as compared to its predecessor—could produce acceptable images under markedly inferior lighting conditions.

for 110 cameras, and Kodak has never made any other color print film in the 110 size.

C. *Photofinishing Services and Photofinishing Equipment*

Before 1954, Kodak's Color Print and Processing Laboratories (CP&P) had a nearly absolute monopoly of color photofinishing maintained by a variety of practices. Accounting for over 95% of color film sales, Kodak sold every roll with an advance charge for processing included. Consumers had little choice but to purchase Kodak film, and in so doing they acquired the right to have that film developed and printed by CP&P at no further charge. Since few customers would duplicate their costs to procure the services of a non-Kodak photofinisher, Kodak was able to parlay its film monopoly to achieve equivalent market power in photofinishing.[9]

This film/processing "tie-in" attracted the attention of the Justice Department, and in 1954 a consent decree changed the structure of the color photofinishing market drastically. Kodak was forbidden to link photofinishing to film sales, and it agreed to make its processing technology, chemicals, and paper available to rivals at reasonable rates. As a result, CP&P's share of the market plummeted from 96% in 1954 to 69% two years later, and it has declined sharply ever since. In 1970, CP&P accounted for but 17% of the market, and by 1976 its share reached a low of 10%. There are now approximately 600 independent photofinishers in the United States.

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[9] To be sure, Kodak could not in this fashion control the market for color reprints—production of additional prints from slides or negatives. Here it resorted to other tactics. By refusing to sell the special paper or chemicals necessary to produce such reprints to rival photofinishers, it ensured—since there was no other adequate source for these supplies—that even this segment of the market did not escape its grip.

Berkey is one of the largest of these processors. It has been a photofinisher since 1933, but until 1954 its principal business was developing and printing black-and-white film.[10] In addition, Berkey purchased Kodak black-and-white film, which was sold without a processing tie-in, for resale to its photofinishing customers. After the 1954 decree, Berkey applied to Kodak for the appropriate licenses and in 1956 began to process significant amounts of color film. It now finishes more 126 and 110 color print film than does Kodak.

A variety of equipment is used to process film, and the Kodak Apparatus Division (KAD) designs and produces most of the machinery used by CP&P. Kodak also sells some equipment to other photofinishers, but this is an insignificant portion of its business; indeed, until the introduction of the 110 system, Kodak made still film processing equipment for its own use only. Several other firms supply photofinishing equipment to the rival processors, and Berkey does not contend that Kodak monopolized or attempted to monopolize this market.

D. *The Color Paper Market*

The market for color paper—that is, paper specially treated so that images from color film may be printed on it—effectively came into being after entry of the 1954 consent decree. Before then, Kodak was for all practical purposes the only color photofinisher, and its requirements for color paper were met entirely by the paper division of Kodak Park Works in Rochester. The remain-

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[10] Prior to 1954 a small part of Berkey's business consisted of processing Anscocolor film—manufactured by a rival of Kodak's, Ansco—into both slides and color prints. Using paper and chemicals supplied by Ansco, Berkey was also able to produce color prints from Kodachrome slides.

ing processors, who dealt with non-Kodak color film and used non-Kodak paper, occupied only four percent of the color photofinishing market. Consequently, the vertical foreclosure created by CP&P's lock on photofinishing and its exclusive use of Kodak color paper was virtually complete.

Although the 1954 decree steadily loosened Kodak's grip in photofinishing, it did not immediately affect the firm's control of color paper. For more than a decade, the independent photofinishers that sprang up after the decree was entered looked only to Kodak for their paper supplies. Indeed, although entry by both foreign and domestic paper manufacturers has reduced Kodak's share substantially, to a low of 60% in 1976, the firm's color paper operations have remained remarkably profitable. Between 1968 and 1975, while its market share was falling from 94% to 67%, Kodak's earnings from operations as a percentage of sales remained virtually constant, averaging 60% for the period. Moreover, the most recent telling event in the market has not been entry but exit: GAF Corporation announced in 1977 that it was abandoning its effort to sell color paper, leaving Kodak with only one domestic and two foreign competitors.

Kodak, then, is indeed a titan in its field, and accordingly has almost inevitably invited attack under § 2 of the Sherman Act. Few, if any, cases have presented so many diverse and difficult problems of § 2 analysis. It is appropriate, therefore, to elucidate some fundamental principles of law relating to that statutory provision.

II. § 2 OF THE SHERMAN ACT

The Sherman Antitrust Act of 1890 has been characterized as "a charter of freedom," *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 359 (1933). For nearly

ninety years it has engraved in law a firm national policy that the norm for commercial activity must be robust competition. The most frequently invoked section of the Act is the first, which forbids contracts, combinations, or conspiracies in restraint of trade. But the prohibition of § 1 is incomplete, *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 60-61 (1911), for it only applies to conduct by two or more actors. If sufficiently powerful, however, a single economic entity may also stifle competition. 1 R. Callmann, *The Law of Unfair Competition, Trademarks, and Monopolies* 341-42 (3d ed. 1967). Accordingly, in § 2 of the Sherman Act, Congress made it unlawful to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize" any part of interstate or foreign commerce. It is § 2 to which we give our principal attention in analyzing this case.

In passing the Sherman Act, Congress recognized that it could not enumerate all the activities that would constitute monopolization. Section 2, therefore, in effect conferred upon the federal courts "a new jurisdiction to apply a 'common law' against monopolizing." 3 P. Areeda & D. Turner, *Antitrust Law* 40 (1978). In performing that task, the courts have enunciated certain principles that by now seem almost elementary to any student of antitrust law. But, because § 2 must reconcile divergent and sometimes conflicting policies, it has been difficult to synthesize the parts into a coherent and consistent whole. To provide a framework for deciding the issues presented by this case, therefore, we begin by stating what we conceive to be the fundamental doctrines of § 2.

A. *Monopoly Power as the Essence of the § 2 Violation*

The gravamen of a charge under § 1 of the Sherman Act is conduct in restraint of trade; no fundamental alter-

ation of market structure is necessary. Thus, certain restrictive practices among competitors, such as price fixing, are illegal *per se.* That the conspirators lack the market power to affect prices is immaterial. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 224 n.59 (1940). Section 2, by contrast, is aimed primarily not at improper conduct but at a pernicious market structure in which the concentration of power saps the salubrious influence of competition.

Indeed, there is little argument over the principle that existence of monopoly power—"the power to control prices or exclude competition," *E. I. du Pont de Nemours & Co., supra,* 351 U.S. at 391—is "the primary requisite to a finding of monopolization." 1 M. Handler, *Twenty-five Years of Antitrust* 691 (1973). The Supreme Court has informed us that "monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised." *United States v. Griffith,* 334 U.S. 100, 107 (1948).

This tenet is well grounded in economic analysis. There is little disagreement that a profit-maximizing monopolist will maintain his prices higher and his output lower than the socially optimal levels that would prevail in a purely competitive market. *E.g.,* F. Scherer, *Industrial Market Structure and Economic Performance* 13-19 (1970). The price excess represents not a reasonable return on investment but the spoils of the monopolist's power. *E.g.,* L. Sullivan, *Handbook of the Law of Antitrust* 25-26 (1977); 2 P. Areeda & D. Turner, *supra,* at 323-34.

It is not a defense to liability under § 2 that monopoly power has not been used to charge more than a competitive price or extract greater than a reasonable profit. Learned Hand stated the rationale in the *Alcoa* case,

United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945). He said in his incisive manner that the Sherman Act is based on the belief:

> that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.

Judge Hand explained, in addition, that Congress was not "actuated by economic motives alone" in enacting § 2. *Id.* Considerations of political and social policy form a major part of our aversion to monopolies, for concentration of power in the hands of a few obstructs opportunities for the rest.

Because, like all power, it is laden with the possibility of abuse; because it encourages sloth rather than the active quest for excellence; and because it tends to damage the very fabric of our economy and our society, monopoly power is "inherently evil." *United States v. United Shoe Machinery Corp.,* 110 F. Supp. 295, 345 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954); *see United States v. Grinnell Corp.,* 236 F. Supp. 244, 258 (D.R.I. 1964), *aff'd in part,* 384 U.S. 563 (1966). If a finding of monopoly power were all that were necessary to complete a violation of § 2, our task in this case would be considerably lightened. Kodak's control of the film and color paper markets clearly reached the level of a monopoly. And, while the issue is a much closer one, it appears that the evidence was sufficient for the jury to find that Kodak possessed such

power in the camera market as well.[11] But our inquiry into Kodak's liability cannot end there.

B. *The Requirement of Anticompetitive Conduct*

Despite the generally recognized evils of monopoly power, it is "well settled," *see* J. von Kalinowski, *Antitrust Laws & Trade Regulation* ¶ 802(3), at 8-41 (1979), that § 2 does not prohibit monopoly *simpliciter*—or, as the Supreme Court phrased it in the early landmark case of *Standard Oil Co. of New Jersey, supra,* 221 U.S. at 62, "monopoly in the concrete."

Thus, while proclaiming vigorously that monopoly power is the evil at which § 2 is aimed, courts have declined to take what would have appeared to be the next logical step—declaring monopolies unlawful *per se* unless specifically authorized by law. To understand the reason for this, one must comprehend the fundamental tension—one might almost say the paradox—that is near the heart of § 2. This tension creates much of the confusion surrounding § 2. It makes the cryptic *Alcoa* opinion a litigant's wishing well, into which, it sometimes seems, one may peer and find nearly anything he wishes.

The conundrum was indicated in characteristically striking prose by Judge Hand, who was not able to resolve it.

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[11] See our discussion of the relevant markets, Part I *supra.* Kodak sold approximately two-thirds of all amateur conventional still cameras throughout most of the relevant period. The frequency with which flashlamp manufacturers approached Kodak with suggestions for joint development of products and their willingness to acquiesce in arguably one-sided agreements is further evidence of Kodak's power in the camera market. See our discussion of Berkey's § 1 allegations, Part V, *infra.* The precipitous decline, beginning in 1976, of Kodak's share of the camera market was evidence that the jury could consider, although it was not dispositive.

Having stated that Congress "did not condone 'good trusts' and condemn 'bad' ones; it forbad all," *Alcoa, supra,* 148 F.2d at 427, he declared with equal force, "The successful competitor, having been urged to compete, must not be turned upon when he wins," *id.* at 430. Hand, therefore, told us that it would be inherently unfair to condemn success when the Sherman Act itself mandates competition. Such a wooden rule, it was feared, might also deprive the leading firm in an industry of the incentive to exert its best efforts. Further success would yield not rewards but legal castigation. The antitrust laws would thus compel the very sloth they were intended to prevent. We must always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition. *E.g., Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.,* No. 77-7617, slip op. at 2196 (2d Cir. Apr. 16, 1979).

In *Alcoa* the crosscurrents and pulls and tugs of § 2 law were reconciled by noting that, although the firm controlled the aluminum ingot market, "it may not have achieved monopoly; monopoly may have been thrust upon it." 148 F.2d at 429. In examining this language, which would condemn a monopolist unless it is "the passive beneficiary of a monopoly," *id.* at 430, we perceive Hand the philosopher. As an operative rule of law, however, the "thrust upon" phrase does not suffice. It has been criticized by scholars, 3 P. Areeda & D. Turner, *supra,* at 20; L. Sullivan, *supra,* at 96-97; Handler, *Some Unresolved Problems of Antitrust,* 62 Colum. L. Rev. 930, 934 (1962), and the Supreme Court appears to have abandoned it. *See United States v. Grinnell Corp.,* 384 U.S. 563, 570-71 (1966); 1 M. Handler, *supra,* at 692. *Grinnell* instructs that after possession of monopoly power is found, the second element of the § 2 offense is "the willful acquisition

or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." 384 U.S. at 570-71.

This formulation appears to square with the understanding of the draftsmen of the Sherman Act that § 2 does not condemn one "who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well." *United Shoe Machinery Corp., supra,* 110 F. Supp. at 341 (quoting legislative history). Thus the statement in *Alcoa* that even well-behaved monopolies are forbidden by § 2 must be read carefully in context. Its rightful meaning is that, if monopoly power has been acquired or maintained through improper means, the fact that the power has not been used to extract improper benefits provides no succor to the monopolist.

But the law's hostility to monopoly power extends beyond the means of its acquisition. Even if that power has been legitimately acquired, the monopolist may not wield it to prevent or impede competition. Once a firm gains a measure of monopoly power, whether by its own superior competitive skill or because of such actions as restrictive combinations with others, it may discover that the power is capable of being maintained and augmented merely by using it. *E.g., Lorain Journal Co. v. United States,* 342 U.S. 143 (1951). That is, a firm that has achieved dominance of a market must find its control sufficient to preserve and even extend its market share by excluding or preventing competition. A variety of techniques may be employed to achieve this end—predatory pricing, lease-only policies, and exclusive buying arrangements, to list a few.

Even if the origin of the monopoly power was innocent, therefore, the *Grinnell* rule recognizes that maintaining or extending market control by the exercise of that power is

sufficient to complete a violation of § 2. As we have explained only considerations of fairness and the need to preserve proper economic incentives prevent the condemnation of § 2 from extending even to one who has gained his power by purely competitive means. The district court judge correctly indicated that such a monopolist is tolerated but not cherished. Thus, the rule of *Grinnell* must be read together with the teaching of *Griffith*, that the mere existence of monopoly power "whether lawfully or unlawfully acquired," is in itself violative of § 2, "provided it is coupled with the purpose or intent to exercise that power." 334 U.S. at 107.

The key to analysis, it must be stressed, is the concept of market power. Although power may be derived from size, *e.g., United States v. Swift & Co.*, 286 U.S. 106, 116 (1932), the two are not identical. F. Scherer, *supra*, at 352. A firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing, for example, a large and efficient factory. These benefits are a consequence of size and not an exercise of power over the market.[12] Nevertheless, many anticompetitive actions are possible or effective only if taken by a firm that dominates its smaller rivals. *See Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894, 925-26 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). A classic illustration is an insistence that

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[12] Nor is a lawful monopolist ordinarily precluded from charging as high a price for its product as the market will accept. True, this is a use of economic power; indeed, the differential between price and marginal cost is used as an indication of the degree of monopoly power, 2 P. Areeda & D. Turner, *supra*, at 323-24; *see Borden, Inc.*, 3 Trade Reg. Rep. (CCH) ¶ 21,490, at 21,502-03 (FTC 1978). But high prices, far from damaging competition, invite new competitors into the monopolized market. *See* Part IV, *infra*. Excessive prices may, however, create an illegal "price squeeze" in another market. *See Alcoa, supra*, 148 F.2d at 438.

those who wish to secure a firm's services cease dealing with its competitors. *See, e.g., Lorain Journal Co., supra.* Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even "honestly industrial." *Alcoa, supra,* 148 F.2d at 431.

In sum, although the principles announced by the § 2 cases often appear to conflict, this much is clear. The mere possession of monopoly power does not *ipso facto* condemn a market participant. But, to avoid the proscriptions of § 2, the firm must refrain at all times from conduct directed at smothering competition. This doctrine has two branches. Unlawfully acquired power remains anathema even when kept dormant. And it is no less true that a firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market.

C. *Monopoly Power as a Lever in Other Markets*

It is clear that a firm may not employ its market position as a lever to create—or attempt to create—a monopoly in another market. *See, e.g., Griffith, supra; Smith-Kline Corp. v. Eli Lilly & Co.,* 575 F.2d 1056 (3d Cir.), *cert. denied,* 99 S. Ct. 123 (1978). Kodak, in the period relevant to this suit, was never close to gaining control of the markets for photofinishing equipment or services and could not be held to have attempted to monopolize them.[13] Berkey nevertheless contends that Kodak illicitly gained an advantage in these areas by leveraging its power over film and cameras. Accordingly, we must deter-

[13] The jury rejected this contention, which was submitted to them *dubitante.*

mine whether a firm violates § 2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market. We hold, as did the lower court, that it does.

This conclusion appears to be an inexorable interpretation of the antitrust laws. We tolerate the existence of monopoly power, we repeat, only insofar as necessary to preserve competitive incentives and to be fair to the firm that has attained its position innocently. There is no reason to allow the exercise of such power to the detriment of competition, in either the controlled market or any other. That the competition in the leveraged market may not be destroyed but merely distorted does not make it more palatable. Social and economic effects of an extension of monopoly power militate against such conduct.

The *Griffith* case confirms this view. There, a chain of motion picture exhibitors operated the only theaters in a number of towns, and used its concomitant buying power to extract from distributors certain exclusive rights in other localities where it faced challengers. The Court held that monopoly power had been illegally used "to beget monopoly," 334 U.S. at 108. Its rationale swept more broadly, however, for it admonished that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *Id.* at 107.

This rule is linked to the prohibition against tying arrangements in the sale of goods and services. *See* 3 P. Areeda & D. Turner, *supra,* at 223-24. Indeed, in *Northern Pacific Railway v. United States,* 356 U.S. 1, 11 (1958), the Supreme Court described the "vice" of ties in language evocative of *Griffith:* "the use of economic power in one market to restrict competition on the merits in another." And to condemn a tie, the market for the

tied product need not be monopolized. It suffices that a "substantial" amount of competition is foreclosed. *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 608-09 (1953); *International Salt Co. v. United States,* 332 U.S. 392, 396 (1947).

We need not rely solely on policy considerations or an analysis of the *Griffith* dictum to support the view asserted here. Indeed, what ever problems of murkiness may plague the *Alcoa* opinion, on this point it is pellucid. The defendant had employed its monopoly power in the ingot market to impose a price squeeze on the manufacturers of aluminum sheet.[14] Although this court expressly noted that there was no attempt to monopolize the sheet market, it held the challenged practice to be "an unlawful exercise of 'Alcoa's' power." 148 F.2d at 438. A more recent case arriving at the same conclusion is *Sargent-Welch Scientific Co. v. Ventron Corp.,* 567 F.2d 701, 711-13 (7th Cir.), *cert. denied,* 99 S.Ct. 87 (1978). There a manufacturer of precision scientific instruments with a monopoly in the market for electromagnetic microbalances allegedly threatened to refuse to sell these devices to retailers who did not stock its millibalances as well. The court ruled that this practice would violate § 2, even though Ventron did not seek or gain a monopoly in the market for millibalances.[15]

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[14] That is, Alcoa sold ingot to rival sheetmakers at such a high price that it gained a distinct competitive advantage for its own sales of sheet.

[15] We cannot accept Kodak's argument that, read literally, § 2 prevents a plaintiff from recovering unless there was at least an attempt to monopolize the market in which it claims to have been injured. Since monopoly power itself is the target of § 2, it is unreasonable to suggest that a firm that possesses such power in one market and uses it to damage competition in another does not "monopolize" within the meaning of the statute.

Accordingly, the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2, even if there has not been an attempt to monopolize the second market. It is the use of economic power that creates the liability. But, as we have indicated, a large firm does not violate § 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity—more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.

We shall now apply to the case at bar the principles we have set forth above.

III. The 110 System

We turn now to the events surrounding Kodak's introduction of the 110 photographic system in 1972. In many respects, the factors present here are representative of the case as a whole. They involve four of the five principal markets and provide the basis for several of the damages verdicts upheld by the district court, including the largest, an award of $15,250,000, before trebling, for lost camera sales.

We commented earlier on the camera revolution sparked by Kodak's introduction of the 126 Instamatic in 1963. Ben Berkey, chairman of Berkey Photo, described the

camera's cartridge-loading feature as "foolproof" and remarked that the new simple system gave the industry "a great boost." Even before the 126 was introduced, however, Kodak had set its sights on a new, smaller line of Instamatic cameras. The aim of Kodak's Project 30, or P-30, as it was often called, was a camera barely one inch thick but capable of producing photographs as clear and large as its bulkier cousins.

Kodak's desire to produce large, high-quality snapshots from a small camera created successive ripples in a number of ponds. As camera size decreases, so does the area of film exposed when the shutter is opened. Thus the negative must be substantially enlarged to produce a print, and the P-30 group was concerned that the Kodak color print film then in use, Kodacolor X, might not be equal to the task. There was fear that it was too "grainy"—that full-size photographs printed from tiny Kodacolor X negatives would have an unacceptably speckled, pebbly appearance, reflecting the extreme magnification of the small light-sensitive grains constituting the film.

The early view at P-30 had been that despite this problem Kodacolor X would prove "quite adequate" for the new format. By 1966, however, the Kodacolor Future System Committee, considering Kodak's film sales in the 126 size as well as in the format being created by Project 30, began actively to consider the possibility of developing a new type of Kodacolor film. This engendered the second set of ripples, for the committee realized that basic changes in the film would require a new photofinishing process, conducted at temperatures higher than those used in the so-called C-22 method by which prints were made from Kodacolor X. Some committee members, therefore, expressed concern about the effect that a new process might have on independent photofinishers, who developed

Kodak film and were purchasers of Kodak equipment and supplies. These concerns were shared by a number of Kodak scientists, such as D.M. Zwick, who feared an "unethical" attempt to create a "deliberate . . . incompatibility with systems other than Kodacolor." [16]

Nevertheless, on May 10, 1967, the committee recommended that Kodak proceed with the development of the new film and finishing process, tentatively labeled P-118. This recommendation was adopted at a meeting of the Kodak management on September 20. Although management believed that many of the film improvements were desirable "without regard to the P-30 program," it decided that Kodak should consider marketing the new film in the P-30 size for approximately one year before introducing it in the 126 format. A firm date was not set at that time for introduction of P-118, but by 1969 Kodak decided that P-118 should be used to help launch the P-30 camera system in March 1972. This decision appears to have been influenced by the views of those Kodak officers who believed that

> [w]ithout a new film, the [camera] program is not a new advertisable system. Without the film, our

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[16] Writing on March 9, 1967, Zwick saw "no need" for a new film, which would require a higher-temperature process: "We can make *small* improvements in Kodacolor X grain and sharpness, in a film which could go through the C-22 process." On the same day, another Kodak scientist, N.H. Groet of the Color Photography Division, wrote that he was "convinced that Project 30 could go with the presently available Kodacolor X film." Like Zwick, Groet conceded that a finer-grained film "would be most welcome for P-30," but he did not believe that major changes in Kodacolor X would be necessary. Indeed, he believed that the new finishing process being considered by the Kodacolor Future System Committee would raise hell in the photofinishing business, would do little to decrease the cost of the operation, and that the ultimate customer would not benefit.

> splicer and processors [for the new high-temperature photofinishing process] are not required.

To meet this self-imposed deadline for P-118, Kodak was required to act in great haste. Indeed, the minutes of a Film Process Subcommittee meeting of August 29, 1969, noted that the decision for a 1972 release date required a "crash program" by all participating divisions. Development schedules were altered and some tests eliminated altogether. Not surprisingly, then, as the target date approached, Kodak realized that its new film was plagued by a number of difficulties.

Shortly after initial production runs began in October 1971, Kodak recognized that "several product deficiencies" would exist in the film, now called Kodacolor II, at the time of introduction. Indeed, just eight days before the joint announcement of the new camera, film, and photofinishing process, a technical committee listed eleven "presently identified" problems that could affect "the customer's ultimate quality." Not only did Kodacolor II have a significantly shorter shelf life than had been anticipated, but it also proved grainier than Kodak had originally hoped. This problem was highly significant, of course, because low graininess was supposedly the quality that made Kodacolor II especially suitable for the Pocket Instamatic cameras.[17]

Despite these deficiencies, Kodak proceeded with its plans for introduction of the 110 system, of which Koda-

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[17] Kodacolor II's grain, though disappointing, was clearly superior to that of Kodacolor X. Berkey does not appear to dispute the point. Shortly after introduction of the 110 system, a confidential memorandum prepared by a competitor in the film market compared Kodacolor II with Kodacolor X and found that the new film "yields a less granular image structure and, therefore, better detail rendition in an enlarged color print."

color II had became an integral part. On March 16, 1972, amid great fanfare, the system was announced. Finally, said Kodak, there was a "little camera that takes big pictures." Kodacolor II was "a remarkable new film"—indeed, the best color negative film Kodak had ever manufactured. There had long been other small cameras, Kodak explained:

> But they weren't like these. Now there are films fine enough, and sharp enough, to give you big, sharp pictures from a very small negative.

In accord with Kodak's 1967 plan, Kodacolor II was sold only in the 110 format for eighteen months after introduction. It remains the only 110-size color print film Kodak has ever sold.[18]

As Kodak had hoped, the 110 system proved to be a dramatic success. In 1972—the system's first year—the company sold 2,984,000 Pocket Instamatics, more than 50% of its sales in the amateur conventional still camera market. The new camera thus accounted in large part for a sharp increase in total market sales, from 6.2 million units in 1971 to 8.2 million in 1972. Rival manufacturers hastened to market their own 110 cameras, but Kodak stood alone until Argus made its first shipment of the "Carefree 110" around Christmas 1972. The next year, although Kodak's competitors sold over 800,000 110 cameras, Kodak retained a firm lead with 5.1 million. Its share of 110 sales did not fall below 50% until 1976. Meanwhile, by 1973 the 110 had taken over most of the amateur market from the 126, and three years later it accounted for nearly four-fifths of all sales.

Berkey's Keystone division was a late entrant in the 110 sweepstakes, joining the competition only in late

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[18] Three pre-existing Kodak films were, however, sold for other uses: Verichrome Pan for black-and-white snapshots, and Kodachrome X and Ektachrome X for color slides.

1973. Moreover, because of hasty design, the original models suffered from latent defects, and sales that year were a paltry 42,000. With interest in the 126 dwindling, Keystone thus suffered a net decline of 118,000 unit sales in 1973. The following year, however, it recovered strongly, in large part because improvements in its pocket cameras helped it sell 406,000 units, 7% of all 110s sold that year.

Berkey contends that the introduction of the 110 system was both an attempt to monopolize and actual monopolization of the camera market. It also alleges that the marketing of the new camera constituted an impermissible leveraging of Kodak's film monopoly into the two photofinishing markets, services and equipment.[19]

Because the jury returned what amounted to general verdicts for the plaintiff on each of these charges, we are bound in the following discussion to construe the evidence and the possible inferences in the light most favorable to Berkey. *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 696 & n.6 (1962). We note *en passant,* however, that in large and complex cases such as this, involving many novel legal issues, the better practice would have been to require special verdicts or the submission of interrogatories to the jury pursuant to Fed. R. Civ. P. 49. In that way the right to a jury trial of all factual issues is preserved[20] while the probability of a la-

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[19] The jury found Kodak guilty of leveraging its monopoly power into the market for photofinishing chemicals, *see* note 1 *supra.* Berkey withdrew this claim during the damages trial, citing its inability to obtain statistical proof of its own harm.

[20] Since the issue is not presented on this appeal, we need not express our view on whether some actions may be too complex to be tried to a jury. The relevant cases are canvassed in Note, *The Right to a Jury Trial in Complex Civil Litigation,* 92 Harv. L. Rev. 898 (1979).

borious and expensive retrial is reduced. *See SCM Corp. v. Xerox Corp.*, 463 F. Supp. 983, 988-90 & nn. 13, 15 (D. Conn. 1978), *remanded on other grounds*, No. 79-8018 (2d Cir. May 10, 1979). Certainly the already difficult task of reviewing a case of this magnitude would have been eased somewhat for this court if we knew precisely what the jury's findings were on several specific factual issues.

A. *Attempt to Monopolize and Monopolization of the Camera Market*

There is little doubt that the evidence supports the jury's implicit finding that Kodak had monopoly power in cameras.[21] The principal issues presented to us regarding the effect of the 110 introduction in the camera market are whether Kodak engaged in anticompetitive conduct and, if so, whether that conduct caused injury to Berkey.

It will be useful at the outset to present the arguments on which Berkey asks us to uphold its verdict:

(1) Kodak, a film and camera monopolist, was in a position to set industry standards. Rivals could not compete effectively without offering products similar to Kodak's. Moreover, Kodak persistently refused to make film available for most formats other than those in which it made cameras. Since cameras are worthless without film, this policy effectively prevented other manufacturers from introducing cameras in new formats. Because of its dominant position astride two markets, and by use of its film monopoly to distort the camera market, Kodak forfeited its own right to reap profits from such innovations without providing its rivals with sufficient advance information to enable them to enter the market with copies of the new product on the day of Kodak's introduction. This

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[21] *See* note 11 *supra*.

is one of several "predisclosure" arguments Berkey has advanced in the course of this litigation.

(2) The simultaneous introduction of the 110 camera and Kodacolor II film, together with a campaign advertising the two jointly, enabled Kodak to garner more camera sales than if it had merely scaled down Kodacolor X to fit the new camera. The jury could conclude that Kodacolor II was an inferior product and not technologically necessary for the success of the 110. In any event, Kodak's film monopoly prevented any other camera manufacturer from marketing such a film-camera "system" and the joint introduction was therefore anticompetitive.

(3) For eighteen months after its introduction, Kodacolor II was available only in the 110 format. Thus it followed that any consumer wishing to use Kodak's "remarkable new film" had to buy a 110 camera. Since Kodak was the leading—and at first the only—manufacturer of such devices, its camera sales were boosted at the expense of its competitors.

For the reasons explained below, we do not believe any of these contentions is sufficient on the facts of this case to justify an award of damages to Berkey. We therefore reverse this portion of the judgment.

1. *Predisclosure*

Through the 1960s, Kodak followed a checkered pattern of predisclosing innovations to various segments of the industry. Its purpose on these occasions evidently was to ensure that the industry would be able to meet consumers' demand for the complementary goods and services they would need to enjoy the new Kodak products. But predisclosure would quite obviously also diminish Kodak's share of the auxiliary markets. It was therefore, in the

words of Walter Fallon, Kodak's Chief Executive Officer, "a matter of judgment on each and every occasion" whether predisclosure would be for or against Kodak's self-interest. Thus, well before the 1965 introduction of Super-8 movie films, Kodak, which had a relatively small share of the movie camera market, provided sufficient information to companies such as Keystone and Bell & Howell to enable them to make cameras to use the new film. It also released processing information so that photofinishers could develop the film. But in 1963, when Kodak came out with Kodacolor X and the 126 Instamatic, it kept its own counsel until the date of introduction.

As early as 1968, some Kodak employees urged that advance warning of the P-30 system would be needed, at least to film processors and manufacturers of photofinishing equipment, to give them time to prepare for Kodacolor II and the new high-temperature finishing process, which was eventually labeled C-41. One memorandum noted that "P-30 will require more changes in photofinishing techniques than were required for P-13 [the 126 system]. These differences . . . seem to indicate a minimum 6 months advance disclosure to other firms."[22] Nevertheless, Kodak decided not to release advance information about the new film and format. The decision was evidently based on the perception of Dr. Louis K. Eilers, Kodak's chief executive officer at that time, that Kodak would gain more from being first on the market for the sale of all goods and services related to the 110 system than it would lose from the inability of other photofinishers to process Kodacolor II. An important factor in Eilers's thinking may have been that Kodak had already decided to manufacture the new film initially in the 110

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[22] The same memorandum also recommended six-month predisclosure to competing film manufacturers.

format only. Since Kodacolor II could not be used in any pre-existing cameras, the demand for photofinishing services and equipment in the first several months would be within the capacities of CP&P and KAD.

Although Kodak had most seriously considered divulging advance information of the 110 system to processors and equipment manufacturers, it was a rival camera maker that forced a small breach in its wall of secrecy. In the summer of 1971, Bell & Howell, implicitly threatening legal action, began to pressure Kodak "to notify photographic equipment manufacturers in advance of its introduction of new films or film formats which require changes in equipment design." Harmar Brereton, Kodak's general counsel, insisted in letters to Bell & Howell that such predisclosure was not necessary and would raise legal problems of its own. Nevertheless, afraid that the two companies "were getting ready to get into the ring," Kodak determined to avoid litigation if it could, and it proposed an experimental predisclosure arrangement with the 110 system. On January 3, 1972, Brereton informed Bell & Howell that Kodak would soon introduce "a new cartridge-loading still camera and [slide] projector to accommodate a new film format." More information, Brereton explained, would be forthcoming only for a fee, necessary to compensate Kodak for its "very considerable research and development expenses" and to represent the value of such knowledge to the recipient.

Brereton's letter made clear that the information would be available to other camera makers "on a nondiscriminatory basis," and within the next two weeks Kodak explained the offer to Berkey. For a fee of $10,000 Kodak would provide a general description of the new film format and cartridge, a view of the cartridge and sample prints and slides, the anticipated dates of announce-

ment and commercial introduction, and an outline of the terms on which Kodak would further disclose "such information as we believe will enable you to design and manufacture cameras to accept our new cartridge and film format." Berkey paid the $10,000 fee and also the supplemental fees, totalling $50,000, for eleven sheets of specifications and notes. For the $60,000 Berkey gained somewhat less than two months advance knowledge of information it needed to compete with Kodak in the sale of 110 cameras. The jury could unquestionably conclude that this was far from adequate to permit Berkey to be "at the starting line" when the 110 was introduced.

Judge Frankel did not decide that Kodak should have disclosed the details of the 110 to other camera manufacturers prior to introduction. Instead, he left the matter to the jury, instructing them as follows:

> Standing alone, the fact that Kodak did not give advance warning of its new products to competitors would not entitle you to find that this conduct was exclusionary. Ordinarily a manufacturer has no duty to predisclose its new products in this fashion. It is an ordinary and acceptable business practice to keep one's new developments a secret. However, if you find that Kodak had monopoly power in cameras or in film, and if you find that this power was so great as to make it impossible for a competitor to compete with Kodak in the camera market unless it could offer products similar to Kodak's, you may decide whether in the light of other conduct you determine to be anticompetitive. Kodak's failure to predisclose was on balance an exclusionary course of conduct.

We hold that this instruction was error and that, as a matter of law, Kodak did not have a duty to predisclose

information about the 110 system to competing camera manufacturers.

As Judge Frankel indicated, and as Berkey concedes, a firm may normally keep its innovations secret from its rivals as long as it wishes, forcing them to catch up on the strength of their own efforts after the new product is introduced. *See, e.g., Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974). It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavors, this incentive would very likely be vitiated.

Withholding from others advance knowledge of one's new products, therefore, ordinarily constitutes valid competitive conduct. Because, as we have already indicated, a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits, any success that it may achieve through "the process of invention and innovation" is clearly tolerated by the antitrust laws. *United Shoe Machinery Corp., supra,* 110 F. Supp. at 344.

The Supreme Court's language in *United States v. National Lead Co.*, 332 U.S. 319 (1947), is instructive on this score. There, National Lead and du Pont were found to have engaged in an illegal patent pool that restrained commerce in titanium products. As part of its decree, the district court ordered the firms to make licenses available at reasonable fees and also to make available—for a period of three years and at a reasonable fee—certain information on processes exploiting these patents. The Supreme Court upheld these requirements as a reasonable

remedy for the antitrust violations. *Id.* at 334-35. It squarely rejected, however, the Government's attempt to extend the decree by requiring the defendants to furnish—again for only three years and at a reasonable fee—all information desired by any applicant relating to the methods and processes for manufacturing titanium pigments:

> The attempt of the Government to throw the field of technical knowledge in the titanium pigment industry wide-open would reduce the competitive value of the independent research of the parties. It would discourage rather than encourage competitive research. *Id.* at 359.

Moreover, enforced predisclosure would cause undesirable consequences beyond merely encouraging the sluggishness the Sherman Act was designed to prevent. A significant vice of the theory propounded by Berkey lies in the uncertainty of its application. Berkey does not contend, in the colorful phrase of Judge Frankel, that "Kodak has to live in a goldfish bowl," disclosing every innovation to the world at large.[23] However predictable in its application, such an extreme rule would be insupportable. Rather, Berkey postulates that Kodak had a duty to disclose limited types of information to certain competitors under specific circumstances. But it is difficult to comprehend how a major corporation, accustomed though it is to making business decisions with antitrust considerations in mind, could possess the omniscience to anticipate all the instances in which a jury might one day in the future retrospectively conclude that predisclosure

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[23] This is apparent from the transcript of the conference to settle the language of the charge to the jury.

was warranted.[24] And it is equally difficult to discern workable guidelines that a court might set forth to aid the firm's decision. For example, how detailed must the information conveyed be? And how far must research have progressed before it is "ripe" for disclosure? These inherent uncertainties would have an inevitable chilling effect on innovation. They go far, we believe, towards explaining why no court has ever imposed the duty Berkey seeks to create here.

An antitrust plaintiff urging a predisclosure rule, therefore, bears a heavy burden in justifying his request. Berkey recognizes the weight of this burden. It contends that it has been met. Kodak is not a monolithic monopolist, acting in a single market. Rather, its camera monopoly was supported by its activity as a film manufacturer. Berkey therefore argues that by not disclosing the new format in which it was manufacturing film, Kodak unlawfully enhanced its power in the camera market. Indeed, Kodak not only participates in but monopolizes the film industry. The jury could easily have found that, when Kodak introduced a new film format, rival camera makers would be foreclosed from a substantial segment of the market until they were able to manufacture cameras in the new format. Accordingly, Berkey contended that Kodak illegitimately used its monopoly power in film to gain a competitive advantage in cameras. Thus Berkey insists that the jury was properly permitted to consider whether, on balance, the failure to predisclose the new format was exclusionary. We disagree.

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[24] Berkey's argument that Kodak considered predisclosing the 110 system, and so could not be surprised when found liable for failing to do so, is thus a two-edged sword. It illustrates the difficulties in prediction even when the problem has been squarely faced.

We note that this aspect of Berkey's claim is in large measure independent of the fact that a new film, Kodacolor II, was introduced simultaneously with the new format. It is primarily introduction of the format itself—the size of the film and the cartridge in which it is packaged—of which Berkey complains. Indeed, at oral argument counsel for Berkey contended that predisclosure would have been required even had Kodak merely cut down Kodacolor X to fit the new 110 camera and cartridge.

We do not perceive, however, how Kodak's introduction of a new format was rendered an unlawful act of monopolization in the camera market because the firm also manufactured film to fit the cameras. The 110 system was in substantial part a camera development. After all, P-30 existed long before the P-118 film project began, and much of the creative energy behind it was consumed by efforts to produce the camera itself.[25] Indeed, Berkey not only argues that a new film was not necessary to introduce the new pocket cameras; it also concedes that the early models of its own 110 cameras, brought to market some eighteen months after it first learned of the new format, suffered because of the haste with which they were designed.

Clearly, then, the policy considerations militating against predisclosure requirements for monolithic monopolists are equally applicable here. The first firm, even a monopolist, to design a new camera format has a right to the lead time that follows from its success. The mere fact that Kodak manufactured film in the new format as

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[25] The "red-eye" problem experienced by the early 110 models, *see* note 35 *infra*, does not detract from the fact that the new camera was indeed smaller and more convenient than its predecessors.

well, so that its customers would not be offered worthless cameras, could not deprive it of that reward. Nor is this conclusion altered because Kodak not only participated in but dominated the film market. Kodak's ability to pioneer formats does not depend on it possessing a film monopoly. Had the firm possessed a much smaller share of the film market, it would nevertheless have been able to manufacture sufficient quantities of 110-size film—either Kodacolor X or Kodacolor II—to bring the new camera to market. It is apparent, therefore, that the ability to introduce the new format without predisclosure was solely a benefit of integration and not, without more, a use of Kodak's power in the film market to gain a competitive advantage in cameras.

Indeed, such authority as exists supports this conclusion. *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978) (*Memorex*), was a case similar in some respects to this one. IBM was the leading manufacturer of central data processing units (CPUs) and competed with Memorex and others to supply peripheral equipment for use in conjunction with IBM CPUs. When IBM made changes in the intricate interface—the "computer 'plug'"—by which peripherals are attached to the central system, it did not provide advance information to Memorex, thereby forcing its rival to learn what it could after the new CPUs were shipped to customers. Memorex contended that to compete effectively in the peripherals market it needed to know, under some form of licensing arrangement, about interface changes as soon as IBM announced its products. *Id.* at 436-37. Noting the total absence of authority in support of this position, the district court indicated that plaintiff could properly be left to rely on "reverse engineering" to develop IBM-compatible equipment. IBM

would thus be unchallenged for a time in the market for certain peripherals, but "[d]epriving IBM of its lead time would remove its incentive to invent." *Id.* at 437.

The prediclosure demanded here is much more radical than that sought and rejected in *Memorex*. Berkey claims that it should have been given the information about Kodak's new film format long before product announcement and without any licensing fee. Moreover, the possibility lurking in *Memorex* that IBM, by creating technological incompatibilities, was tying peripherals sales to its CPUs is not present here. *Cf. Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1330 (5th Cir. 1976). Kodak's new format was primarily a camera development, and the use of Kodacolor II did not in itself create any incompatibilities with an existing camera. Regardless of whether the district court decided *Memorex* correctly—a question we are pleased to leave to our colleagues in the Ninth Circuit—the case makes it manifest that there is no authority for the extreme position asserted by Berkey.

Our analysis, however, must proceed beyond the conclusion that introduction of film to meet Kodak's new camera format was not in itself an exercise of the company's monopoly power in film. Berkey contends that Kodak in the past used its film monopoly to stifle format innovations by any other camera manufacturer. Accordingly, it argues that Kodak was barred from reaping the benefits of such developments without making predisclosure to allow its rivals to share from the beginning in the rewards.

There is, indeed, little doubt that the jury could have found that Kodak, by refusing to make film available on economical terms, obstructed sales of cameras in competing formats. Thus, Kodak has never supplied film to

fit the Minox, a small camera[26] that uses a cartridge similar to that of the Instamatics and that has been on the market since the 1930s, or similar cameras by Minolta and Mamiya that were also introduced before the Kodak 126. Merchants of these cameras, including Berkey, made numerous requests that Kodak sell film packaged in their formats, with or without the Kodak name. As an alternative, they asked Kodak to sell bulk film rolls large enough to permit the camera manufacturers economically to cut the film down to the appropriate size and spool it. Kodak denied all such appeals. Some of the miniature cameras did survive but, as even Kodak's own economic expert testified, its policy drastically reduced the ability of rival manufacturers to compete by introducing new camera formats.[27]

We accept the proposition that it is improper, in the absence of a valid business policy, for a firm with monopoly power in one market to gain a competitive advantage in another by refusing to sell a rival the monopolized goods or services he needs to compete effectively in the second market. Indeed, Kodak itself was the defendant in the leading case establishing this point. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927); *accord, Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F.2d 334, 339-40 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971). Moreover, as indicated by our discussion of § 2 principles, such a use

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[26] The Minox "spy camera" was even smaller, but substantially more expensive, than the 110.

[27] Although Kodak does not manufacture cameras in the 135 format, it does sell film for them. This policy may represent a perception that the 135 format competes less directly with Kodak's popular cameras than do the Minolta and other miniature models.

of power would be illegal regardless of whether the film monopoly were legally or illegally acquired. It may be that Kodak violated the Sherman Act when it refused to sell Berkey bulk film for use in the Minolta camera, and Berkey might well have recovered for its loss of Minolta sales and for any additional expenses incurred because of Kodak's conduct.

But Berkey did not sue Kodak then for its refusal to sell film, and it concedes that it is not now claiming a right to damages on this basis. Rather, it contends that Kodak's past offenses created a continuing duty to disclose its new formats to competing camera manufacturers, and that its violation of that obligation supports the jury's verdict. For two reasons, however, we decline to recognize such a duty.

First, the benefits that would flow to Kodak's rivals in the camera market from such a rule bear no relationship to the injury caused them by the monopolist's refusal to sell films for their competing camera formats. There is no reason to suppose, for example, that the loss suffered by Berkey because Kodak undercut Minolta sales was at all comparable to the boon Berkey would have received had Kodak given it the opportunity to participate from the beginning in the 110 revolution.[28] Indeed, some of the

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[28] Even if the format obstructed by Kodak were comparable to the 110, predisclosure would not be a necessary remedy, as the following example demonstrates. Suppose that Berkey, unaware that Kodak is planning to bring forth the 110 camera, asks Kodak to make film available for a new camera it has designed that happens to be identical in all respects to the 110 except that it requires a slightly different film format. Kodak, without a legitimate competitive reason and solely to prevent Berkey's camera sales, declines to supply the film. Berkey then concludes that marketing of its new camera would be economically unfeasi-

(footnote continued on following page)

camera manufacturers who would be benefited by predisclosure might not have participated in—or even contemplated entering—the market at the time Kodak committed its alleged violations. For them, predisclosure would be pure windfall.

Second, it would be inappropriate to hold that Kodak should spontaneously have recognized a duty to release advance information of its new products to its competitors. It is important to note that Berkey, which no longer sells cameras, does not advance its predisclosure argument as part of a demand for equitable relief. Where a firm has engaged in monopolistic practices, a court is not limited, in fashioning prospective remedies, to an injunction against future violations of law. *See, e.g., Schine Chain Theatres, Inc. v. United States,* 334 U.S. 110, 128 (1948). Hence the function of the court includes "undoing" what the monopoly achieved by its illegal acts. *United*

(footnote continued from preceding page)

ble. Just three months later, without predisclosure to Berkey, Kodak introduces the 110, which is a great commercial success.

At first it might appear that in this extreme hypothetical case Berkey has a right to share the initial profits of the 110 camera through predisclosure. On closer examination, it becomes clear that the wrong to Berkey is not the absence of knowledge of the 110 but exclusion from the market of its own essentially identical camera. To be sure, most of Kodak's 110 sales would have been captured earlier by Berkey had it not been prevented from introducing its camera, so the volume of Kodak's 110 sales may assist in computation of Berkey's damages. That, however, is the only relevance of the 110 system to this hypothetical case. As the premise is varied to bring the hypothetical closer to the actual case at bar—for example, by attenuating the physical similarity between the two cameras or the proximity of their arrival in the market—even this relevance disappears. Kodak's violation is completed when it blocks Berkey's new camera format; nothing is added to the offense by its decision to introduce its own new format without predisclosure.

States v. Paramount Pictures, Inc., 334 U.S. 131, 171 (1948).

Accordingly, if Berkey were still a camera maker, it might be able to demand that Kodak, to nullify the effect of its monopolistic obstruction of new formats for competing cameras, be required to allow its rivals to share from the start in the business created by its own changes in format. Even in the equitable context, *National Lead* would caution against a decree that might stifle future innovations. But Berkey, in any event, does not demand prospective relief. Instead it asks us to condemn Kodak retrospectively, holding that it violated § 2 and so is liable for damages, because it did not decide on its own initiative to take unusual, self-abnegatory actions as a corrective for unadjudicated prior offenses. This is without justification.

Conclusion. We have held that Kodak did not have an obligation, merely because it introduced film and camera in a new format, to make any predisclosure to its camera-making competitors. Nor did the earlier use of its film monopoly to foreclose format innovation by those competitors create of its own force such a duty where none had existed before. In awarding Berkey $15,250,000, just $828,000 short of the maximum amount demanded, the jury clearly based its calculation of lost camera profits on Berkey's central argument that it had a right to be "at the starting line when the whistle blew" for the new system.[29] The verdict, therefore, cannot stand.

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[29] The three 110 damages theories, submitted to the jury in the alterative, attempted to measure the displacement of Berkey camera sales from the moment the 110 system was introduced. One theory, allocating to Berkey its "fair share" of all Kodak post-introduction camera sales, indicated untrebled damages of $16,073,000. The other two theories, addressing 110 sales only, suggested $13,668,000 and $15,835,000 respectively.

2. *Systems Selling*

Berkey's claims regarding the introduction of the 110 camera are not limited to its asserted right to predisclosure. The Pocket Instamatic not only initiated a new camera format, it was also promoted together with a new film. As we noted earlier, the view was expressed at Kodak that "[w]ithout a new film, the [camera] program is not a new advertisable system." Responding in large measure to this perception, Kodak hastened research and development of Kodacolor II so that it could be brought to market at the same time as the 110 system. Based on such evidence, and the earlier joint introduction of Kodacolor X and the 126 camera, the jury could readily have found that the simultaneous release of Kodacolor II and the Pocket Instamatic was part of a plan by which Kodak sought to use its combined film and camera capabilities to bolster faltering camera sales. Berkey contends that this program of selling was anticompetitive and therefore violated § 2. We disagree.

It is important to identify the precise harm Berkey claims to have suffered from this conduct. It cannot complain of a product introduction *simpliciter* for the same reason it could not demand predisclosure of the new format: any firm, even a monopolist, may generally bring its products to market whenever and however it chooses.[30] Rather, Berkey's argument is more subtle. It claims that by marketing the Pocket Instamatics in a system with a

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[30] This is not to say, of course, that new product introductions are *ipso facto* immune from antitrust scrutiny, and we do not agree with Kodak's argument that they are, *see, e.g., Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied*, 99 S. Ct. 87 (1978) (use of power over old product to promote sale of new); in all such cases, however, it is not the product introduction itself, but some associated conduct, that supplies the violation.

widely advertised new film, Kodak gained camera sales at Berkey's expense. And, because Kodacolor II was not necessary to produce satisfactory 110 photographs and in fact suffered from several deficiencies, these gains were unlawful.[31]

It may be conceded that, by advertising Kodacolor II as a "remarkable new film" capable of yielding "big, sharp pictures from a very small negative," Kodak sold more 110 cameras than it would have done had it merely marketed Kodacolor X in 110-size cartridges. The quality of the end product—a developed snapshot—is at least as dependent upon the characteristics of the film as upon those of the camera. It is perfectly plausible that some customers bought the Kodak 110 camera who would have purchased a competitor's camera in another format had Kodacolor II not been available and widely advertised as capable of producing "big, sharp pictures" from the tiny Pocket Instamatic. Moreover, there was also sufficient evidence for the jury to conclude that a new film was not necessary to bring the new cameras to market. Walter Fallon testified that in 1967, as manager of Kodak's Film Emulsion and Plate Organization, he expressed the view that Kodacolor X "would give satisfactory pictures, satisfactory customer results" in the P-30 format. Documents introduced at trial indicated that this opinion was shared by at least two Kodak research scientists.[32]

But necessity is a slippery concept. Indeed, the two scientists, Zwick and Groet, conceded that improvements

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[31] To the extent that Berkey argues that Kodak's past monopolization of film hindered any other firm from introducing a new photographic system, the contention is merely a repetition of that rejected in Part III.A.1 *supra*.

[32] *See* note 16 *supra*.

in the quality of Kodacolor X would be "most welcome." Even if the 110 camera would produce adequate snapshots with Kodacolor X, it would be difficult to fault Kodak for attempting to design a film that could provide better results. The attempt to develop superior products is, as we have explained, an essential element of lawful competition. Kodak could not have violated § 2 merely by introducing the 110 camera with an improved film.

Accordingly, much of the evidence at trial concerned the dispute over the relative merits of Kodacolor II and Kodacalor X. There was ample evidence that for some months following the 110 introduction, Kodacolor II was inferior to its predecessor in several respects. Most notably, it degenerated more quickly than Kodacolor X, so that its shelf life was shorter.[33] It is undisputed, however, that the grain of Kodacolor II, though not as fine as Kodak had hoped, was better than that of the older film.[34]

In this context, therefore, the question of product quality has little meaning. A product that commends itself to many users because superior in certain respects may be rendered unsatisfactory to others by flaws they considered fatal. Millions of consumers, for example, evidently found the 110 camera highly attractive because of its "pocketability." Others, perhaps more concerned over the quality of their flash pictures, found the original models unsatisfactory because of the high incidence of

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[33] Testimony and documents introduced at trial indicated that Kodacolor II lost much of its "speed", *see* note 8 *supra*, within three to six months of manufacture. In addition, there were problems with "latent image keeping"—the ability of the film to retain a scene until the film was developed.

[34] *See* note 17 *supra*.

"red-eye."[35] Similarly, some individuals would, if given the option and aware of the relevant factors,[36] select Kodacolor II over Kodacolor X because of its superior grain, which was especially useful for a small camera; others might choose Kodacolor X because the original variety of Kodacolor II had to be used more quickly to produce attractive pictures.

It is evident, then, that in such circumstances no one can determine with any reasonable assurance whether one product is "superior" to another. Preference is a matter of individual taste. The only question that can be answered is whether there is sufficient demand for a particular product to make its production worthwhile, and the response, so long as the free choice of consumers is preserved, can only be inferred from the reaction of the market.

When a market is dominated by a monopolist, of course, the ordinary competitive forces of supply may not be fully effective. Even a monopolist, however, must generally be responsive to the demands of customers, for if it persistently markets unappealing goods it will invite a loss of sales and an increase of competition.[37] If a monopolist's products gain acceptance in the market, therefore, it is of no importance that a judge or jury may later regard them as inferior, so long as that success was not based on any form of coercion. Certainly the mere introduction of Kodacolor II along with the Pocket Insta-

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[35] "Red-eye" is the appearance of a red glint in the eye of the snapshot's subject on a picture taken with a flashlamp. It is a result in large part of the small distance between the flash device and the camera lens. Hence, it was a greater problem for the original 110 cameras than for their larger predecessors in the 126 format.

[36] *See* note 42 *infra.*

[37] *See* 3 P. Areeda & D. Turner, *supra,* at 41-42.

matics did not coerce camera purchasers.[38] Unless consumers desired to use the 110 camera for its own attractive qualities, they were not compelled to purchase Kodacolor II—especially since Kodak did not remove any other films from the market when it introduced the new one. If the availability of Kodacolor II spurred sales of the 110 camera, it did so because some consumers regarded it as superior, at least for the smaller format.[39]

Of course, Kodak's advertising encouraged the public to take a favorable view of both Kodacolor II and the 110 camera, but that was not improper. A monopolist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier. *See American Tobacco Co. v. United States,* 328 U.S. 781, 797 (1946); *Borden, Inc.,* 3 Trade Reg. Rep. (CCH) ¶ 21,490 (FTC 1978). And in its advertising, a producer is ordinarily permitted, much like an advocate at law, to bathe his cause in the best light

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[38] Similarly, it appears that the Pocket Instamatic spurred sales of Kodak's film at the expense of its competitors, despite a red-eye problem that made the camera unacceptable to many consumers. But it would appear unreasonable on its face to allow a jury to conclude from this that the introduction of the 110 camera, which millions of other customers welcomed eagerly, was improper conduct.

[39] Thus, the situation might be completely different if, upon the introduction of the 110 system, Kodak had ceased producing film in the 126 size, thereby compelling camera purchasers to buy a Kodak 110 camera. Or had Kodak shifted production in all formats from Kodacolor X to Kodacolor II before other photofinishers could process the new film, it would force photographers to procure their photofinishing services from CP&P. In such a case the technological desirability of the product change might bear on the question of monopolistic intent. *See Response of Carolina, Inc. v. Leasco Response, Inc.,* 537 F.2d 1307, 1330 (5th Cir. 1976).

possible.[40] Advertising that emphasizes a product's strengths and minimizes its weaknesses does not, at least unless it amounts to deception, constitute anticompetitive conduct violative of § 2.[41]

We conclude, therefore, that Kodak did not contravene the Sherman Act merely by introducing Kodacolor II simultaneously with the Pocket Instamatic and advertising the advantages of the new film for taking pictures with a small camera.

3. *Restriction of Kodacolor II to the 110 Format*

There is another aspect to Berkey's claim that introduction of Kodacolor II simultaneously with the Pocket Instamatic camera was anticompetitive. For eighteen months after the 110 system introduction, Kodacolor II was

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[40] Indeed, Kodak apparently did precisely that in introducing the 110 camera. Aware of the camera's substantial red-eye problem, the firm evidently decided "to provide enough ambient light for exposure without flash" at the press conference announcing the new system. This rather obvious ploy certainly did not amount to the type of deception that might, as we indicate in the following footnote, support an action under § 2.

[41] There was evidence that Kodak indicated on the boxes in which Kodocalor II was sold that the film had a shelf life of 14 months, whereas in fact the film lost half its speed within three to six months. We need not decide whether this action amounted to deceptive advertising, or whether and under what circumstances such deception might amount to a violation of § 2. *See* 3 P. Areeda & D. Turner, *supra*, at 278-79. The Sherman Act is not a panacea for all evils that may infect business life. Before we would allow misrepresentation to buyers to be the basis of a competitor's treble damage action under § 2, we would at least require the plaintiff to overcome a presumption that the effect on competition of such a practice was *de minimis*. *See id.* Berkey, however, has failed to provide any evidence that a significant number of Kodak 110 purchasers would have, if the Kodacolor II boxes had included accurate information on the shelf life of the film, bought a Berkey camera in a pre-existing format instead.

available only in the 110 format. Since Kodak was the first to have the 110s on the market, Berkey asserts it lost camera sales because consumers who wished to use the "remarkable new film" would be compelled to buy a Kodak camera. This facet of the claim, of course, is not dependent on a showing that Kodacolor II was inferior in any respect to Kodacolor X. Quite the opposite is true. The argument is that, since consumers were led to believe that Kodacolor II was superior to Kodacolor X, they were more likely to buy a Kodak 110, rather than a Berkey camera, so that the new film could be used.

Where a course of action is ambiguous, "consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct," *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978); *accord, e.g., Sargent-Welch Scientific Co., supra,* 567 F.2d at 712. We shall assume *arguendo* that Kodak violated § 2 of the Sherman Act if its decision to restrict Kodacolor II to the 110 format was not justified by the nature of the film but was motivated by a desire to impede competition in the manufacture of cameras capable of using the new film. This might well supply the element of coercion we found lacking in the previous section. We shall assume also that there was sufficient evidence for the jury to conclude that the initial decision to market Kodacolor II exclusively in the 110 format during its introductory period was indeed taken for anticompetitive purposes.[42]

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[42] We have already stated that in September 1967 Kodak's management noted that development of the new film was justified, even if Project 30 were never brought to fruition, because of the benefits it would yield to pre-existing formats. Kodak, however, tentatively decided at the same meeting that Kodacolor II would

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But to prevail, Berkey must prove more, for injury is an element of a private treble damages action. Berkey must, therefore, demonstrate that some consumers who would have bought a Berkey camera were dissuaded from doing so because Kodacolor II was available only in the 110 format. This it has failed to establish. The record is totally devoid of evidence that Kodak or its retailers actually attempted to persuade customers to purchase the Pocket Instamatic because it was the only camera that could use Kodacolor II, or that, in fact, any consumers did choose the 110 in order to utilize the finer-grained film.

To be sure, some of Kodak's advertisements emphasized the superior qualities of Kodacolor II, but the gist of these messages was merely that Kodacolor II, unlike previous films, would yield "big, sharp pictures" from a small camera. In short, Kodak simply claimed to have achieved its goal of truly developing a Pocket Instamatic system whose color prints would be "as close as possible to the prints currently obtained from 126-size Kodacolor X." Stressing the "pocketability" of the 110 format, Kodak did not emphasize Kodacolor II as an independent reason to choose a photography system. Little of the advertising mentioned Kodacolor II by name. Of even greater weight is the fact that none in any way implied that the new film was available only in the 110 size . Accordingly, the content of Kodak's publicity, standing alone, would not

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at first be sold in the 110 format only. *See* Part III.A *supra*. Kodak's explanation for the initial restriction of Kodacolor II to the 110 size is that the advantages of the new film were most useful for small cameras; until the defects in Kodacolor II were eliminated, therefore, Kodak preferred to continue selling Kodacolor X in pre-existing formats. That Kodak did not advertise the restriction was evidence in support of its assertion that the plan was not undertaken for an anticompetitive purpose.

permit a jury rationally to infer that Berkey was injured by the restriction of Kodacolor II to the 110 format.

The abstract possibility nevertheless remains that there might have been some customers who would have purchased a Berkey camera in one of the pre-existing formats but decided to select a Kodak 110 instead because they were aware that there was no alternative means of using Kodacolor II, even in the absence of advertising to that effect. Yet, although millions of amateur photographers bought Pocket Instamatics, Berkey did not produce anyone at the trial to testify that he was so motivated. Nor did Berkey present the testimony of camera dealers, or evidence of any kind, to establish that such customers existed. Indeed, Berkey declined to challenge the testimony of a camera dealer that he never promoted the fact that Kodacolor II was available only in the 110 size.[43] We expressed our concern over the absence of such evidence at oral argument, but Berkey's post-argument brief[44] did not point to any relevant items in the record that we had overlooked. We conclude, therefore, that the jury could not find that Berkey suffered more than *de minimis* injury, if any, because Kodacolor II was limited to the 110 format. Although the antitrust laws afford latitude in permitting the factfinder to estimate "the extent of the damages" where precise calculation is impossible, they do not allow recovery where there has been no showing that plaintiff suffered cognizable injury. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931); *see Zenith Radio Corp. v. Hazel-*

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[43] Advertisements of dealers, like those of Kodak, emphasized that Kodacolor II would yield sharp pictures but not that the film was exclusively available in the 110 size.

[44] Because of the extraordinary complexity of this case, we invited the parties to submit post-argument briefs on any aspect of the case they felt merited further attention.

tine Research, Inc., 395 U.S. 100, 123 (1969); *Gottesman v. General Motors Corp.*, 436 F.2d 1205, 1210 (2d Cir. 1971).

Voluminous discovery and a prolonged trial have already given Berkey more than ample opportunity to adduce evidence, which it failed to do, in support of its consistently maintained claim that it lost camera sales because of restriction of Kodacolor II to the 110 format. It would make a mockery of the adversary system in a case of this character, where great expenditures of time and money have been made and where the plaintiff was represented by counsel of extraordinary ability and experience, to afford a new trial so that missing elements of proof could be produced, if, indeed, they exist.

To summarize our conclusions on the 110 camera claims, we hold:

1. Kodak was under no obligation to predisclose information of its new film and format to its camera-making competitors.

2. It is no basis for antitrust liability that Kodacolor II, despite certain deficiencies compared to Kodacolor X, may have encouraged sales of the 110 camera.

3. Finally, although the restriction of Kodacolor II to the 110 format may have been unjustified, there was no evidence that Berkey was injured by this course of action.

We, therefore, reverse so much of the judgment as awarded Berkey damages based on the introduction of the 110 camera.[45]

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[45] But see Part V *infra*, where we hold that Berkey's claim arising from the introduction of the "flipflash" in 1975, the damages for which were not considered separately but were included in the total computation of damages for lost 110 camera sales, must be submitted to a new trial on these damages only.

B. *Photofinishing and Photofinishing Equipment Markets*

The introduction of the 110 system provided the foundation not only for the enormous camera award but also for the much smaller damage items—$55,700 and $19,000, respectively, before trebling—alloted for lost photofinishing profits and for overcharges on photofinishing equipment. These verdicts, moreover, were the basis for the only injunctive relief decreed below. We reverse and remand for a new trial so much of the judgment as was based on damages for the photofinishing and equipment claims, and we vacate and remand the equitable decree for further consideration in light of the principles set forth in this opinion.

1. *Damages*

Berkey's damages claims here are based on the fact that Kodacolor II, introduced along with the 110 camera, required the new, high-temperature C-41 finishing process instead of the C-22 process used for Kodacolor X and similar films. Thus independent photofinishers could not offer processing service for Kodacolor II—the only color print film Kodak ever offered in the 110 size—until they bought new equipment and received instruction in and supplies for C-41 processing. Moreover, Kodak did not give advance warning to the independents that the new film would be introduced, nor did it predisclose the C-41 process to other makers of photofinishing equipment. Accordingly, CP&P was able to begin processing Kodacolor II several weeks before its competitors.

Furthermore, it is urged that Berkey faced greater expense in finishing Kodacolor II than did CP&P, because Kodak refused to divulge the formulae for chemicals used in the C-41 process. Large photofinishers like Berkey pre-

ferred to buy these compounds from chemical suppliers in bulk, both to save money and to gain flexibility. But to be able to process Kodacolor II, they were forced to buy pre-mixed "kits" from Kodak at twice the price. Kodak, meanwhile, provided all but one of the CP&P plants with bulk chemicals.[46] And, because for some time Kodak was the only manufacturer of machinery capable of processing the new film, the independent photofinishers were required to purchase this equipment in order to proceed at all. The jury found that Kodak's prices were excessive and almost certainly found also that the equipment Kodak sold to the independents was vastly inferior to its product for CP&P.

Because of its early jump and greater efficiency in the C-41 process, CP&P gained a disproportionately high share of 110 finishing, an effect Berkey contends lasted through the end of 1973. There was clear evidence that Kodak was aware of the impact its conduct would have on the business of its photofinishing rivals. One Kodak marketing officer urged introduction of Kodacolor II along with the 110 cameras in part to compel the independent photofinishers to buy Kodak C-41 equipment,[47] and Kodak engineers realized that the machinery their firm planned to sell would not allow independents to do more than "limp through the C-22 to P-118 transition stage." Not surprisingly, one Kodak scientist noted early in the development of the 110 system that the new process

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[46] Kodak also did not inform independent photofinishers, or even its own technical sales representatives assigned to help the independents process Kodak films, that there were two distinct "populations" of Kodacolor II with markedly different color characteristics. CP&P, however, was told of this divergence as soon as it was discovered.

[47] *See* Part III.A *supra*.

would "raise hell in the photofinishing business" without benefit to the consumer.[48] And, shortly after Kodacolor II came to market, a worried Kodak employee predicted that CP&P's announcement of its early readiness to process the new film would "cause some photofinishing reaction due to the fact that we are using 110 to gain business over their operations."

Kodak's conduct with respect to the independent photofinishers perhaps may be criticized as shoddy treatment of firms providing an essential service for Kodak products. Indeed, largely for that reason a number of Kodak employees urged that photofinishers and equipment manufacturers be given advance warning of the C-41 process. The purpose of the Sherman Act, however, is not to maintain friendly business relations among firms in the same industry nor was it designed to keep these firms happy and gleeful. *See Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564 (5th Cir. 1978). Moreover, it is clear that Kodak did not monopolize or attempt to monopolize the photofinishing or equipment markets.[49] Thus, it is not liable under § 2 for the actions described above unless it gained a competitive advantage in these markets by use

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[48] *See id.*

[49] *See* Part II.C. & n. 13 *supra*. Although Kodak was for a time the only firm able to finish Kodacolor II, and for a longer period the only company able to provide equipment for the C-41 process, the new process and the machinery used in it did not define separate markets; rather, they were, like Kodacolor II and the 110 camera itself, new entries in markets of wider scope. Kodak held a temporary monopoly in C-41 processing and equipment only in the sense that every firm initially possesses a 100% market share in its own innovations and the peripheral products and services associated with it. *See Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894, 915 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) (endorsing district court statement).

of the monopoly power it possessed in other segments of the industry.

It bears emphasis that only the wielding of power will support recovery in this context; advantages inuring to Kodak's photofinishing and equipment arms by virtue of membership in an integrated firm will not. As we suggested earlier, a use of monopoly power is an action that a firm would have found substantially less effective, or even counterproductive, if it lacked market control. Thus, the classic example of such a use is a refusal to deal in goods or services needed by a competitor in a second market. *E.g., Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). But, a firm without control of the market that attempts this will simply drive the purchaser to take its patronage elsewhere.

Similarly, suppose that Kodak was aware that most consumers would prefer Kodacolor X but nevertheless decided to replace it by Kodacolor II, hoping thereby to place competing photofinishers at a disadvantage. A small film manufacturer attempting this tactic would find it ineffective and self-destructive—the slack in C-22 films would be filled by other firms, and consumers would have no reason to buy a film they did not like. Kodak, by contrast, would face a far different calculus: consumers desiring film would have little choice but to buy Kodacolor II and would thereby ineluctably strengthen CP&P's hand in photofinishing.

It is not clear, however, whether in bringing forth the 110 system Kodak did anything that a smaller firm with integrated capabilities but no market control might not have done.[50] Kodak did not use its power to shift the en-

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[50] We do not, of course, intend to cast any doubt on the well-established doctrine, which we have reaffirmed, *see* Part II.B *supra*,

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tire photofinishing market from C-22 to the C-41 process, for Kodacolor II was introduced only in the 110 size and at first represented a minuscule percentage of all color print photofinishing. Indeed, the film was not marketed in other formats until eighteen months later, long after the original surprise had worn off.[51] In sum, Kodak's ability to gain a rapidly diminishing competitive advantage with the introduction of the 110 system may have been attributable to its innovation of a new system of photography and not to its monopoly power. On the other hand, we cannot dismiss the possibility that Kodak's monopoly power in other markets was at least a partial root of its ability to gain an advantage over its photofinishing competitors and to sell them overpriced equipment. For example, it may be that, had Kodak possessed only a small portion of the film market, other manufacturers would have found it more feasible to bring out their C-22 films in the 110 size. CP&P would then have had no competitive advantage for a large percentage of 110 photofinishing. Moreover, absent a Kodak film monopoly, the independent photofinishers might not have

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that certain actions may violate § 2 when taken by a monopolist even though they would be perfectly legitimate in the hands of a firm lacking market control. Rather, our consideration rests on a simple proposition: if an action that gains a firm a competitive advantage is effective because of the company's efficiency, prestige, and innovativeness, and not because of its control over the market, the action is not a use of power.

[51] In 1972, fewer than one-tenth as many rolls of Kodacolor film were processed in the 110 format as were finished in the 126 size, and CP&P processed only about 15% of the 110 rolls. Even in 1973, photofinishers processed more than three times as many 126 Kodacolor rolls—nearly all of it Kodacolor X—as Kodacolor rolls in the 110 format, and CP&P's share in the 110 size fell to approximately 6%.

felt an urgent need to buy expensive equipment for the C-41 process.[52]

We cannot resolve this ambiguity. The instructions to the jury did not draw with sufficient sharpness the distinction between exercises of power and the natural benefits of size and integration. Nor is the record so clear that we can say with certainty on which side of this demarcation the facts fall. The parties quite naturally gave relatively little attention to this aspect of the case, in light of the comparatively small sums involved. If the parties wish to pursue these claims to a final determination, therefore, a new trial will be necessary.

2. *Equitable Relief*

Although Berkey's claim for damages in the photofinishing market was limited to the events surrounding the 110 introduction, the plaintiff also made extensive allegations that Kodak had used its control over other markets to disadvantage photofinishing competitors. For example, Berkey complained about Kodak's policy, evidently discontinued after the commencement of this suit, in the sale of color paper. The emulsions on each production run of paper are slightly different, yielding a variance of color characteristics. Because tests and machinery adjustments are necessary each time a roll of paper from a new "emulsion run" is used, large photofinishers like Berkey naturally wish to buy as many rolls as possible from a single run. Kodak, however, refused to sell more

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[52] We do not hold that Kodak, which did not have a monopoly in photofinishing equipment, was required to provide such machinery for other photofinishers. But a violation might be found if Kodak's ability to market equipment at an excessive price was attributable to its monopoly power in other areas.

than 400 rolls from any one run to each photofinisher. Given Kodak's monopoly power in color paper, this refusal to deal would, unless justified by a valid business reason, appear to violate § 2 and form the basis for a grant of equitable relief.

Citing several examples of what he considered to be uses of Kodak's "spectrum of monopoly powers" as a lever in the photofinishing field, Judge Frankel issued a wide-ranging decree that requires the defendant, as he explained, "to treat all photofinishers, including CP&P, alike in relevant respects." Accordingly, any technical information made available by any other branch of Kodak to CP&P must also be offered promptly—on the payment of a $200 annual fee to cover postage, printing, and handling—to all domestic firms providing amateur photofinishing services.

It is evident from our discussion, however, that this decree forecloses not only the use of monopoly power but the legitimate benefits of integration as well. Although an injunction need not be limited to prohibiting repetition of past misconduct, it does not lie within the discretion of the trial judge to restructure a market that Kodak has neither monopolized nor attempted to monopolize. *Cf. Schine Chain Theatres, Inc., supra,* 334 U.S. 125-30; *Paramount Pictures, Inc., supra,* 334 U.S. at 166-75. This portion of the judgment must therefore be vacated. On remand the district court may consider whether a narrower decree, limited to the prevention of uses of monopoly power, may be appropriate. In this regard, the court should consider to what extent the erosion of Kodak's share in the camera and color paper markets lessens the need for injunctive relief.

The decree also mandated the sale of color paper without a Kodak backprint, at the option of the purchaser.

Judge Frankel indicated that Kodak's insistence on placing its backprint on the paper "was, or could be found to be, a device to force Kodak's photofinishing rivals to advertise their competition." Judge Frankel did not expressly consider whether his prohibition was a justifiable curtailment of Kodak's trademark rights. Whatever the merits of such a decree may be in the abstract—and the judge himself indicated at one point that its primary impact would be to benefit Kodak's color paper competitors[53]—the need for it is nullified by Judge Frankel's own observation that Berkey's purchases of Kodak paper fell in 1977 to 7% of its requirements. We therefore direct that the "backprint" relief be eliminated from any decree to be entered on remand.

VI. Film and Color Paper Claims

The second and third largest jury awards were those for monopolization of film and color paper, $11,500,000 and $8,803,000, respectively. Judge Frankel upheld the film verdict but granted judgment n.o.v. for Kodak on color paper. Kodak therefore appeals the former judgment and Berkey the latter. In each of these claims Berkey's contention is that it paid an excessive price for Kodak products. They therefore raise similar issues and we shall discuss them together. We remand both claims for retrial.

It is clear that Kodak possessed a monopoly in the film and color paper markets during the period relevant to this suit. Berkey contends that this power, which enabled Kodak to overcharge its customers, was acquired and maintained, at least in part, by anticompetitive conduct.

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[53] Judge Frankel's opinion appears to contradict itself on this point. *Compare Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404, 425 (S.D.N.Y. 1978) *with id.* at 433.

Some of the evidence introduced by Berkey in support of its claims concerned events that occurred many years ago. In particular, Berkey succeeded in introducing a 1915 decision—which was to play a dramatic role in an unfortunate incident near the close of the liability trial[54]—holding *inter alia* that Kodak, by illegal acquisitions and other improper conduct, had monopolized the photographic paper market. Judge Frankel admitted this evidence as "background" only. Over Berkey's objection, he instructed the jury that it could not base liability on anticompetitive actions that Kodak had committed earlier than the beginning of the limitations period on January 29, 1969, four years before the commencement of suit.

Berkey contends, however, that Kodak has also bolstered its power since 1969 by numerous exclusionary means. In upholding the film verdict against Kodak's motion for judgment n.o.v., Judge Frankel pointed to two particular tactics that he considered to be exclusionary. Most importantly, he held that there was sufficient evidence for the jury to conclude that the introduction of the 110 system illegitimately buttressed Kodak's film sales. The judge also indicated that Kodak improperly stifled film competition by preventing CP&P, its photofinishing arm, from servicing non-Kodak films.

Judge Frankel concluded, with some hesitation, that the evidence of anticompetitive conduct within the limitations period was sufficient to support the entire liability award. The trial judge also had misgivings about his instruction to the jury on the measure of film damages, in which he explained that Berkey could recover the difference between Kodak's monopoly price and the price it would have paid for film in a competitive market. Never-

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[54] *See* Part V *infra*.

theless, he denied Kodak's motion for judgment n.o.v., sustaining the award of damages *in toto.*

Berkey's color paper claim did not fare as well in Judge Frankel's hands, however. As with the film claim, Berkey presented numerous instances of conduct that, it contended, was anticompetitive. Kodak, it charged, manipulated the structure of the photofinishing market to inhibit color paper competition and used its monopoly power in film to advantage its paper sales, designing its films so that they would not be as compatible with competitors' paper as with Kodak's. Moreover, CP&P received instructions to buy only Kodak paper, even though competing products offered advantages in both cost and quality. Judge Frankel surveyed these and other allegations and concluded that in each case either Kodak's conduct was perfectly proper, or that there was insufficient proof that it was tainted by anticompetitive purpose or effect, or that it had no impact on the color paper market. Accordingly, although there was clear evidence that Kodak's monopoly power had enabled it to maintain its color paper prices at a high level, the judge granted Kodak's motion for judgment n.o.v. on this claim.

Excessive prices, maintained through exercise of a monopolist's control of the market, constituted one of the primary evils that the Sherman Act was intended to correct. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890,* 23 U. Chi. L. Rev. 221, 249-52 (1956). Where a monopolist has acquired or maintained its power by anticompetitive conduct, therefore, a direct purchaser may recover the overcharge caused by the violation of § 2. *E.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 487-94 (1968).

But unless the monopoly has bolstered its power by wrongful actions, it will not be required to pay damages

merely because its prices may later be found excessive. Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive. Indeed, although a monopolist may be expected to charge a somewhat higher price than would prevail in a competitive market, there is probably no better way for it to guarantee that its dominance will be challenged than by greedily extracting the highest price it can. *See, e.g.*, L. Sullivan, *supra*, at 117; 3 P. Areeda & D. Turner, *supra*, at 41-42. If a firm has taken no action to destroy competition, it may be unfair to deprive it of the ordinary opportunity to set prices at a profit-maximizing level. Thus, no court has required a lawful monopolist to forfeit to a purchaser three times the increment of its price over that which would prevail in a competitive market. 1 M. Handler, *supra*, at 56-57. Indeed, as one commentator who might favor such a rule concedes, such judicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission. *Id.* We would be wise to decline that function unless Congress clearly bestows it upon us. *See* L. Sullivan, *supra*, at 117-18.

For a purchaser to recover damages under § 2, therefore, it must demonstrate that the monopolist has engaged in some anticompetitive conduct. The further questions must be resolved, however, to give shape to the purchaser's treble damage suit:

1. If an overcharge paid during the limitations period was caused by the defendant's monopoly power, may a plaintiff satisfy the conduct element of the § 2 offense by proving anticompetitive actions that occurred more than four years prior to the commencement of suit?

2. If a defendant has violated § 2, may a purchaser recover the excess of its price over a competitive price, or merely the increment attributable to its anticompetitive conduct?

We hold that Judge Frankel erred in Kodak's favor on the first of these questions but that he was overly generous to Berkey on the second.

A. *Conduct Prior to the Limitations Period*

By statute, 15 U.S.C. § 15b, a four-year period of limitations applies in private antitrust suits. The plaintiff, therefore, clearly can recover only for overcharges suffered since the beginning of the limitations period. It remains to be decided, however, whether the conduct element of the offense may be satisfied by wrongful action occurring before the limitations period but that nevertheless made an enduring contribution to the monopolist's ability to charge an excessive price. Judge Frankel, without articulating reasons, concluded that § 15b requires a negative answer.

Unless tolled, that provision requires suit to be "commenced within four years after the cause of action accrued." In effect, therefore, the judge held that the cause of action of a purchaser seeking to recover an illegal overcharge accrues when the defendant engages in the anticompetitive conduct that is a prerequisite for suit. We believe that the purchaser's claim cannot accrue until it actually pays the overcharge. Accordingly, Judge Frankel's ruling was erroneous.

It is "plain from the treble-damage statute itself [15 U.S.C. § 15]" that "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Although the business of a monopolist's rival may be injured at the time the anticompetitive conduct occurs, a purchaser, by contrast, is not harmed until the monopolist actually exercises its illicit power to extract an excessive price. The case of predatory pricing illustrates the point clearly.

As soon as the dominant firm commences such a policy, other producers, who may be driven out of the market, are injured. But, clearly, purchasers are not, for they receive the temporary boon of artificially low prices. It is only when the monopolist, having devoured its smaller rivals, enjoys the spoils of its conquest by boosting its price to excessive levels that a purchaser "feels the adverse impact" of the violation. *Id.* at 339. And if the monopolist never consummates its scheme by taking this final step, the purchaser has no cause of action.

So long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide. Thus, in this setting, as in "the context of a continuing conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act . . . . [A]s to those damages, the statute of limitations runs from the commission of the act." *Id.* at 338.

Untoward consequences would follow were we to hold that the anticompetitive conduct itself triggered the running of the limitations period. As the Supreme Court stated in *Zenith Radio:*

> [I]t is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, further damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable. *Id.* at 339.

Plainly, at the time a monopolist commits anticompetitive conduct it is entirely speculative how much damage that action will cause its purchasers in the future. Indeed,

some of the buyers who will later feel the brunt of the violation may not even be in existence at the time. *Cf. Continental Ore Co., supra,* 370 U.S. at 709-10. Not until the monopolist actually sets an inflated price and its customers determine the amount of their purchases can a reasonable estimate be made. The purchaser's cause of action, therefore, accrues only on the date damages are "suffered":

> Otherwise future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery, contrary to the congressional purpose that private actions serve "as a bulwark of antitrust enforcement," *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 . . . .

Zenith Radio Corp., supra, 401 U.S. at 340.

Our view is supported by the fundamental principles of § 2 that we outlined earlier in this opinion. Monopoly power, we indicated, is itself the primary target of § 2. To be sure, a showing of anticompetitive conduct is necessary to support liability for damages, for otherwise the law would be unfair to a firm that has gained success solely by fair means. But there can be no unfairness in preventing a monopolist that has established its dominant position by unlawful conduct from exercising that power in later years to extract an excessive price. After all, it is only a pristine "origin," *Alcoa, supra,* 148 F.2d at 429, that may save a monopoly—so long as it continues to refrain from anticompetitive activity—from the condemnation of § 2. The taint of an impure origin does not dissipate after four years if a monopolist continues to extract excessive prices because of it.

Moreover, it would undercut enforcement of the Sherman Act to hold that, if a monopolist merely retains its illicit market control for four years after its last anticompetitive action, it may charge an exorbitant price until its power is eviscerated in an appropriate suit for equitable relief.[55] The rule urged by Kodak would mean that, as the Supreme Court has indicated in a related context:

> those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project. *Schine Chain Theatres, Inc., supra,* 334 U.S. at 128.

An unlawful monopolist must be "deprived of the fruits" of its wrongful conduct, *id.* at 129, and one of the forbidden fruits is an excessive price. In *Grinnell,* Judge Wyzanski also used the biological metaphor: § 2 requires "the rooting out of a plant . . . [that] represents an ultimate growth from seeds which have been declared unlawful." 236 F. Supp. at 258. So long as a monopolist enjoys "the flower of evil," *id.,* at the expense of its customers, those victims must have a remedy.

We hold, therefore, that a purchaser suing a monopolist for overcharges paid within the previous four years may

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[55] If, as the Ninth Circuit has held in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.,* 518 F.2d 913, 922 (9th Cir. 1975), dissolution or divestiture may only be ordered in a Government suit—a question that we of course do not reach—the rule for which Kodak argues would be even less tolerable.

satisfy the conduct prerequisite to recovery by pointing to anticompetitive actions taken before the limitations period. It should not be inferred that this ruling grants antitrust plaintiffs a license to embark on a search for Ichthyosauria—that is, on a time-warped fishing expedition. A trial court in its discretion may always "set a reasonable cut-off date, evidence before which point is to be considered too remote to have sufficient probative value to justify burdening the record with it." *Continental Ore Co., supra,* 370 U.S. at 710. Moreover, the trial court might not be without flexibility to limit the proof where delay in bringing suit may have caused injustice to the defendants. *See* 3 P. Areeda & D. Turner, *supra,* at 93.

B. *Damages to a Monopolist's Purchaser*

Assuming that a purchaser establishes a monopolist's liability to it for an unlawful price, two potential rules of damages come into view. Judge Frankel apparently stated, and in any event the jury clearly acted upon, what may be called the competitve price theory—that a purchaser may recover for the entire excess of the monopolist's price over that which would prevail in a competitive market. We believe that this was error, and that the true measure of damages, which we shall refer to as the wrongful conduct rules, is the price increment caused by the anticompetitive conduct that originated or augmented the monopolist's control over the market.

There is a dearth of cases on point. Indeed, the only citation in Judge Frankel's discussion of this point is to a rather vague *dictum* in *Alcoa.* The reason for this lack of authority is that in most successful monopolization suits brought by purchasers the § 2 violation was merely a con-

sequence of a § 1 offense that provided the rule of damages. Often, for example, the § 2 violation consists of a price-fixing conspiracy among firms controlling a large share of the market. The measure of the damages to one of the conspirators' customers is the difference between the price actually paid and the one at which the product would have sold absent the conspiracy. *E.g., Reiter v. Sonotone Corp.*, 47 U.S.L.W. 4672, 4674 (U.S. June 11, 1979); *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390, 396 (1906). In such a case, the monopoly price is entirely attributable to the anticompetitive conduct. The two alternative rules of § 2 damages therefore merge and it is impossible to tell which would apply if the monopoly power, and hence the excessive price, resulted only in part from wrongful conduct.[56]

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[56] To the extent that any inference may be gleaned from the extended *Hanover Shoe* litigation, it favors the wrongful conduct rule. After the Supreme Court affirmed Judge Wyzanski's judgment in the celebrated *United Shoe* case, Hanover, a United customer, brought an action to recover illegal overcharges. The calculation of Hanover's damages was based on "the excess of leasing costs over what it would have cost to own the same machines had they been available for purchase," *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F. Supp. 258 (M.D.Pa. 1965); *see Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 487 (1968). Significantly, the hypothetical purchase prices for prior years were determined from the actual prices for 1955—the first year the lease-only machines were offered for sale and clearly, as later litigation would demonstrate, a period in which United retained its monopoly. *See United States v. United Shoe Machinery Corp.*, 266 F. Supp. 328, 331 (D.Mass. 1967), *rev'd on other grounds,* 391 U.S. 244 (1968). Moreover, United's anticompetitive leasing policy was only a partial source of its monopoly power; the other roots were, as Judge Wyzanski indicated in his original opinion, "plainly beyond reproach." 110 F. Supp. at 344. It appears, therefore, that damages in *Hanover Shoe* were limited to the price excess caused by United's wrongful conduct.

Without any clear precedent to guide us, we must determine the proper measure of damages in a § 2 case by juxtaposing the basic rule for antitrust damages with the fundamental principles of law under § 2 that we outlined earlier in this opinion. The basic rule was set forth in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), where the Supreme Court declared that plaintiffs in an antitrust action must prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." It is true, as we have previously indicated, that excessive prices are "injury of the type the antitrust laws were intended to prevent." *See* Part II.A *supra*. It is equally evident, however, that more than monopoly power is necessary to make the charging of a noncompetitive price unlawful. Accordingly, a purchaser may recover only for the price increment that "flows from" the distortion of the market caused by the monopolist's anticompetitive conduct.

Were the law otherwise, it would establish an unnecessary and unwarranted trigger mechanism. *See* 3 P. Areeda & D. Turner, *supra,* at 86-87. A pristine monopolist, we have held, may charge as high a rate as the market will bear. But under the competitive price rule, if it committed any anticompetitive conduct—beyond a *de minimis* level—it would suddenly be held liable for three-fold the entire excess of its price over a competitive price. In effect, instead of being required simply to compensate its customers for the consequences of its wrongful action, it would be required to forfeit its legitimately acquired advantages. But the Sherman Act does, as we have said, tolerate the lawfully acquired and maintained monopoly, This principle would be undercut if a monopolist whose position has for the most part been attained legitimately is required to forfeit all fruits of its success because

its power has merely been supplemented by improper conduct.[57]

We recognize that if the monopolist, but for its illegitimate actions, would have had little or no market power, the wrongful conduct and competitive price rules may yield very similar results. The proper standard, though, is one that bases damages on the monopolist's actual record of misconduct.[58]

C. *Summary and Dispositions*

The two issues we have discussed above establish the framework for a purchaser's action under § 2 of the Sherman Act. We believe this structure is not only compelled by law but sensible as well. The wrongful conduct rule indicates that a purchaser can recover for an overcharge paid to a violator of § 2 only to the extent that the price he paid exceeds that which would have been charged in the absence of anticompetitive action. An intermediate step in the analysis may be an attempt to estimate what the monopolist's market share would likely have been but

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[57] The situation might be different in a Government equity action. It is interesting to note that Areeda and Turner would allow the break-up of a persistent monopoly in such a suit even in the absence of exclusionary conduct, 3 P. Areeda & D. Turner, *supra,* at 63-64. They strongly advocate the position we are asserting here, however—that "an injured plaintiff is not entitled to have damages based on the excess of the monopoly price over the competitive price but only to the price increment reasonably attributable to actionable behavior." *Id.* at 73; *see id.* at 99.

[58] We express no view on how the trial judge should allocate the burden of proving this causal relation, or lack of it, when plaintiff makes a preliminary showing of persistent monopoly power and a substantial history of anticompetitive conduct. *Cf. Ohio Valley Electric Corp. v. General Electric Co.,* 244 F. Supp. 914, 946 (S.D.N.Y. 1965).

for the illegitimate conduct; it would then be possible to gauge approximately what price the defendant would have been able to charge with that degree of market control. In any event, courts applying this rule must be aware of the practical limits of the burden of proof that may be demanded of treble damage plaintiffs. *See Zenith Radio Corp., supra,* 395 U.S. at 123; *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264-65 (1946); *Story Parchment Co., supra,* 282 U.S. at 563.

It may, of course, be difficult for a purchaser to demonstrate that conduct occurring many years before the commencement of suit contributed to an overcharge that it paid within the limitations period. That, however, is no reason for denying it the opportunity to do so. The treble damage provision, 15 U.S.C. § 15, was intended in large part as an inducement to encourage potential plaintiffs to endure the considerable expense and labor of seeking recovery against violators of the antitrust laws. *E.g., Reiter, supra,* 47 U.S.L.W. at 4675-76.

It is clear from our holdings that we believe both the film and color paper claims must be remanded for retrial. Judge Frankel upheld the film award for the entire excess of Kodak's prices over a hypothetical competitive price, although the only two examples of post-1969 conduct that he believed were wrongful could not have had a very large impact on Kodak's film prices. The verdict therefore cannot stand, but Berkey has a right to establish at a new trial that anticompetitive conduct, both before and after 1969, enhanced the price it paid for Kodak film.

Similarly, the judgment for Kodak on the color paper claim must be vacated. Judge Frankel did not allow the jury to consider pre-1969 conduct as a foundation for the verdict—despite the concession by Kodak's own economic expert, to be discussed later, that the company's unlawful activities in years past may still have had a bearing on

its power in the photographic paper market. Because Judge Frankel erred by instructing the jury on the competitive price theory of damages, however, we could not simply reinstate the large color paper award, even if we were to hold that the jury may validly have found that Kodak committed anticompetitive conduct in that market since 1969.

We have no occasion to consider the parties' arguments concerning the numerous other Kodak activities that, Berkey contends, were anticompetitive. Because of the general form of the verdicts, we have no way of knowing what the jury's findings were on these matters or which actions were believed to be anticompetitive. Nor do we know what the findings will be on retrial, if this litigation should continue. Indeed, now that we have set forth the broad outlines of principles in this area we earnestly hope that able counsel on both sides will find a way to dispose of this mammoth lawsuit without consuming more court time or incurring more legal expenses. If so, it will not be necessary to resolve any of the lesser questions. If not, there will be no need to retry the issue of monopoly power. Judge Frankel's instruction on this point appears to have been essentially correct, and there was clear evidence supporting the jury's implicit finding that Kodak held such power in the film and color paper markets.

V. The Section 1 Claims

Our discussion thus far has centered around interpretation and application of the provision of the Sherman Act to actions taken by Kodak alone. Berkey claims in addition, however, that Kodak engaged in two separate conspiracies, with the General Electric Company and Sylvania Electric Products, Inc., to restrain trade in the use of new flash devices with amateur cameras.

Appendix B—Opinion of the Court of Appeals

A. *Background*

Amateur photography performed in dim lighting ordinarily requires separate illumination so the scene may be captured on film. This is usually achieved by affixing some type of flash device to the camera. Its purpose is to produce a brief, high-intensity burst of light when the shutter is released.

Kodak does not make such devices. For approximately fifteen years, however, it has engaged in three separate "joint development programs" with lamp manufacturers to ensure that the desired lighting innovations would be compatible with Kodak cameras. In 1963, Sylvania Electric Products, Inc. approached Kodak with a prototype of a new battery-powered light device—the flashcube[59]—and a modified Kodak 126 camera to fire it. Berkey argued that although Kodak did not make meaningful technical contributions to the flashcube, it nevertheless required Sylvania not to disclose its invention to any other camera manufacturer. Accordingly, for some time after the flashcube was introduced along with a line of Kodak flashcube cameras in 1965, Kodak was the only manufacturer able to sell cameras to use the device.[60]

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[59] The flashcube contains four flashbulbs mounted on the face of a small cube, each containing its own reflector. The cube is rotated after each shot, so four flash pictures may be taken without the need to change cubes.

[60] Several other camera makers complained bitterly to Sylvania following this episode. They were particularly disturbed that Sylvania had assigned its camera patents to Kodak, keeping only its lamp patents. One Sylvania official wrote:

> Also during the past years the royalties other camera manufacturers have paid to EK to use Sylvania flashcubes on their equipment have disturbed them deeply. They keep telling us that the flashcube was a Sylvania development . . . why did they have to pay royalties?

Berkey is barred by the statute of limitations from seeking damages for what it terms the "flashcube conspiracy," but it urges that the events in 1963-65 do much to illuminate two more recent incidents. Viewed in the light most favorable to Berkey, as we have indicated the law requires us to do at this appellate juncture, the evidence established that in 1967 Sylvania came to Kodak with another flash invention—the magicube. This device was similar to the flashcube in appearance but did not require batteries. Instead, each of the four lamps in the cube was ignited by percussion, much as a bullet is fired when the firing pin strikes the cartridge. This was a major advance over the flashcube, eliminating dead batteries and other electrical malfunctions that were major causes of lamp failures and consequent missed pictures.

Once more, the two firms entered into a joint project to exploit the Sylvania invention. Over Sylvania's protests, Kodak insisted again that details of the new device be withheld from the public and the trade. Kodak, Berkey contended, maintained this position until just two months before magicubes and magicube cameras were ready for shipment.[61] Sales of Kodak magicube cameras commenced

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[61] As Kodak's trial counsel conceded, there was conflicting evidence concerning the terms of the secrecy agreement. The written agreement permitted disclosure to "other responsible camera manufacturers," but Sylvania never made disclosure to anyone but Polaroid, which only manufactured instant cameras and was thus not a competitor of Kodak's. In October 1968, Sylvania pressed Kodak for an early announcement to the trade, but Kodak resisted, in part to "make sure that our foreign manufacturing plants could change to the new system." Kodak then instituted a "crash program" to get to market before, as the jury could have found, Sylvania unilaterally decided to disclose its invention to the trade.

In March 1970, Sylvania again complained to Kodak about delay, noting that rumors of the Kodak-Sylvania project had

(footnote continued on following page)

in July 1970. Berkey, it appears, was the first competitor to offer its own magicube cameras, reaching the market in October, but its production capacity was at first limited. It was not until late 1971 that Berkey's magicube cameras were truly competitive with Kodak's.

Kodak's joint flash programs, however, were not confined to Sylvania. In 1969, the General Electric Company approached Kodak with proposals for several new flash devices. One was a percussion lamp similar to the magicube; another used a small crystal that could be economically built into a camera and that would, when struck, produce an electrical current sufficient to ignite flash material. The latter device, called "piezo" or "PE" because it used a piezoelectric crystal, provides the focus for the second conspiracy charged by Berkey.

Kodak was troubled by the GE proposal. It was already committed to Sylvania on the magicube project, and there was abundant evidence from which the jury could conclude that Kodak did not wish to introduce two new flash systems at approximately the same time.[62] Rather, its marketing strategy was, as we noted in connection with our discussion of the 110 system, to withhold introduction of improved camera models until the maximum benefit from the prior model had been reaped. The jury's verdict could reflect its belief that Kodak embarked on a care-

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(footnote continued from preceding page)

caused other camera manufacturers to press Sylvania for disclosure. Kodak agreed to a limited form of disclosure, but refused to permit release of, *inter alia*, the design of the camera socket into which the magicube would fit.

[62] In addition to the evidence adduced in connection with the 110 camera that Kodak had a policy of cyclical product introduction, a Kodak official testified that if the piezo would not be ready for the initial 110 introduction, Kodak could not use it for another two or three years.

fully balanced campaign. Kodak desired to cool GE's ardor for its inventions sufficiently to delay introduction of the piezo device for several years, and, at the same time, to avoid the appearance of deferment so that the lamp manufacturer would not seek another camera maker to exploit its invention.[63]

After several years of intermittent discussion, Kodak and GE decided to move forward with the piezo device. In a contract executed on October 31, 1972, they agreed to aim for a Spring 1975 introduction of GE piezo flashlamps and Kodak cameras designed to fire them. Disclosure beforehand to other lamp and camera manufacturers was forbidden. At a joint press conference in April 1975, the two firms announced the GE "flipflash"[64] and two new lines of Kodak 110 cameras designed to accommodate it. Kodak had the field to itself for several months. This time, however, Berkey was not the first non-Kodak camera manufacturer to enter the arena. It did not market its own flipflash cameras until early 1976, months after Japanese and Chinese models had begun to appear.

B. *Joint Development Projects and § 1*

Berkey contends that Kodak's agreements with the magicube and flipflash manufacturers violated § 1 of the Sherman Act. In particular, it charges that although Kodak did not make any meaningful technological con-

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[63] For example, at a time when Kodak was committed to Sylvania and had shelved its own piezo plans, it complimented GE on its devices and urged them to continue development.

[64] This device was a rectangular array of eight bulbs, set in four rows of two. The top four bulbs would be fired and the array would then be "flipped" and the remaining bulbs, now on top, would be used.

tribution to either system, the secrecy agreements it extracted from GE and Sylvania prevented other camera makers from competing in the production of cameras that could cooperate with the new flash devices. Evaluating all the evidence presented on these issues, the jury found Kodak's conduct to be unreasonable restraints of trade.

Kodak's challenge to these verdicts is relatively simple. It argues that both projects "involved millions of dollars of research and development expense by Kodak," and "led directly to the introduction of innovative new products" that "gained wide success." Accordingly, it urges, Berkey's § 1 claims are nothing more than "a mirror image" of the § 2 predisclosure arguments we rejected in Part II of this opinion.

There is a vast difference, however, between actions legal when taken by a single firm and those permitted for two or more companies acting in concert. To repeat a simple example, a monopolist may, assuming he acquired his power legally, charge any nonpredatory price for his product, but agreements among competitors to raise prices have been recognized as *per se* violations of the Sherman Act since *Socony-Vacuum*. *See* Part II *supra*. We have stated that we respect innovation, and we have construed § 2 of the Act to avoid an interpretation that would stifle it. But this is *toto caelo* different from an agreement among a few firms to restrict to themselves the rewards of innovation. Such conduct is not immune to examination under § 1. Citing a case we believe to be inapposite,[65] Kodak contends that it is "not a 'restraint of trade,' reasonable or unreasonable, jointly to develop a new prod-

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[65] *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975), involved the antitrust implications of an attempt to evade Georgia's branch banking laws and has nothing to do with joint development ventures by firms in complementary markets.

uct." Where a participant's market share is large, however, we believe joint development projects have sufficient anticompetitive potential to invite inquiry and thus stand on a different footing.

Joint development programs can benefit competition, *see United States v. Line Material Co.*, 333 U.S. 287, 310 (1948), but they are not without their costs. In analyzing joint research by direct competitors, one commentator has suggested that if several substantial firms in an industry join in research at a scale the remaining firms could not attain, and if the others are not permitted to join the group, the favored competitors might obtain a decisive and unjustified advantage over the rest. L. Sullivan, *supra*, at 298-303. The benefits and detriments of joint research will vary with the circumstances, Sullivan suggests, and the market power of the participant firms is likely to be the most significant factor. *Id.; accord,* Turner, *Patents, Antitrust and Innovation,* 28 U. Pitt. L. Rev. 151, 158-59 (1966).

Kodak and GE, of course, are not direct competitors, and Kodak and Sylvania were at best potential competitors when the magicube was being developed.[66] Nevertheless, because of Kodak's market power over cameras, the exclusionary potential of horizontal research pools was present. In the case of the flipflash, for

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[66] Until 1962, Argus Camera was operated as a division of Sylvania. In May of that year, Sylvania sold Argus for a small amount of cash and $7.8 million in promissory notes. Over the next seven years, as a result of recapitalizations of Argus, Sylvania was, at various times, a major creditor, common shareholder, and preferred shareholder of its former division, on occasion placing a nominee on Argus's Board of Directors. Berkey contended that Sylvania's relationship with Argus permitted the jury to infer that the lamp manufacturer was a potential camera competitor as well.

example, GE indicated early in 1971 that it could be at maximum production in two years. Kodak, however, counselled delay, at one point urging GE project officials to make a show of progress, "even if all you do is 'paint the red base black,'" so that "we'll feel free to work with you." Otherwise, Kodak said, GE could not be assured of being part of Kodak's future flash plans, for "we would then have to ask all [lamp] manufacturers" to submit ideas. A few months later, the two firms executed the formal agreement binding them to joint development of flipflash and nondisclosure to rival lamp and camera manufacturers. From this and other evidence, the jury could have found in the verdict it returned that, without any technological justification, GE kept a desirable innovation off the market for two years solely to suit Kodak's convenience. There is a hollow ring to a claim of justification by appeal to the need to promote innovation, where the result of the conduct was such a clear loss to consumers.

We hasten to add that we do not hold that joint development agreements between a monopolist and a firm in a complementary market are *per se* violations of § 1. It may be, for example, that the market structure is such that only a dominant firm will have the resources necessary to exploit the complementary technology being offered. If such were the case, the alternative to joint development could be no development at all. Accordingly, Judge Frankel appropriately rejected Berkey's request for a *per se* charge. *See generally Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 & n.16 (1977). Nevertheless, as Areeda and Turner have noted, joint ventures involving a monopolist have sufficient anticompetitive potential that they must be scrutinized with care lest they be permitted to fortify the already sub-

stantial entry barriers inherent in a monopolized market. 3 P. Areeda & D. Turner, *supra,* at 114. The relevant variables might include: the size of the joint venturers; their share of their respective markets; the contributions of each party to the venture and the benefits derived; the likelihood that, in the absence of the joint effort, one or both parties would undertake a similar project, either alone or with a smaller firm in the other market; the nature of the ancillary restraints imposed and the reasonableness of their relationship to the purposes of the venture. This list is not intended to be exhaustive, nor do we suggest that each element applies to every case. In analyzing joint development agreements, as elsewhere in § 1, "the factfinder [must] weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T. V., supra,* 433 U.S. at 49.

On the record before us, we have little doubt that a properly instructed jury could find that the magicube and flipflash agreements violated § 1.[67] It remains, therefore, to examine Kodak's challenges to the charge to the jury. Kodak asserts that Judge Frankel erred in instructing the jury to consider whether (1) Sylvania's substantial interest in Argus Camera Co. rendered it a potential camera

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[67] In particular, there was in each instance evidence that Kodak used its camera monopoly to extract secrecy agreements from the lamp manufacturers, and that the benefits it derived from the agreements far exceeded the value of its technological contributions. We note, in passing, that Kodak contends that Berkey should be barred from recovery because a Berkey official once told an officer of GE that Berkey was not interested in innovation, preferring to copy Kodak designs. The evidence concerning this conversation was conflicting, however, and we must assume the jury resolved the conflict in Berkey's favor. Accordingly, we need not determine the effect such a Berkey policy would have on its right to complain of Kodak's illicit agreements with the lamp makers.

competitor of Kodak, and (2) the "legitimate purposes" of the magicube and flipflash agreements might be accomplished by "less restrictive alternatives" than those actually chosen. We believe, however, that the charge provided accurate guidance for the jury's deliberations.

Kodak claims that there was an absence of evidence that an agreement between it and Sylvania not to compete existed; this assertion, however, misses the point. As we noted above, the possibility of individual entry or expansion into the monopolized market is a highly relevant consideration in assessing a joint venture such as the magicube agreement. We agree with the district judge that Sylvania's large interest in Argus was sufficient to raise for the jury the possibility that absent the joint project with Kodak, Sylvania might have produced magicube cameras with Argus.

More troublesome is the contention that Berkey would not have benefited had Sylvania chosen to "go it alone" and therefore lacked standing to raise the Argus issue. *Cf. Brunswick Corp., supra.* But magicube entry on the small scale available to Argus may well have been less harmful to Berkey—and to camera competition in general—than was entry by a monopolist such as Kodak. *See* 3 P. Areeda & D. Turner, *supra,* at 114. In any event, the only objection to the Argus charge that Kodak presented to the district court related to whether Sylvania's ownership of Argus was too remote in time to be relevant to the magicube project, not the "standing" and "noncompeting agreements" contentions now raised on appeal. Accordingly, the latter objections have been waived. Fed. R. Civ. P. 51; *Spano v. N.V. Koninklijke Rotterdamsche Lloyd,* 472 F.2d 33 (2d Cir. 1973).

Kodak also challenges a direction that the jury

> should consider whether, under all the circumstances,

> the legitimate objectives of the programs might have been achieved by alternative means with less restrictive effects, including predisclosure or provisions for royalty-free licensing.

Kodak contends that this in effect directed a verdict for Berkey because, in retrospect, lawyers can always "conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade," *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975). We agree with the Third Circuit that a better charge would be to require that "the restraints . . . not exceed 'the limits *reasonably necessary* to meet the competitive problems,' " *id.* (quoting *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380-81 (1967) (emphasis added by the court)). *American Motor Inns* noted, however, *id.* at 1248, that the existence of alternatives is obviously of vital concern in evaluating putatively anticompetitive conduct. *See, e.g., White Motor Co. v. United States,* 372 U.S. 253, 271-72 (1963) (Brennan, J., concurring); *Foster v. Maryland State Savings & Loan Association,* 590 F.2d 928, 934-35 (D.C. Cir. 1978), *cert. denied,* 99 S. Ct. 842 (1979); 1 M. Handler, *supra,* at 708. Read as a whole, *see, e.g., Chavis v. Finnlines Ltd., O/Y,* 576 F.2d 1072, 1076 (4th Cir. 1978), Judge Frankel's § 1 charge simply presented the availability of less restrictive alternatives to the jury as one among many possibilities to be considered. The quoted paragraph did not in any way diminish the earlier instructions based on the rule of reason, including the specific admonition that no single test determines reasonableness.

Finally, we must address Kodak's contention that even if the less restrictive language passes muster, the reference in this context to predisclosure as a specific al-

ternative does not.[68] As is clear from both the charging conference and Kodak's requests to charge, Kodak views the "fact that these products were developed by two companies, rather than by Kodak alone" as immaterial to the issue of predisclosure. But, given the significantly different posture of single-firm and multi-firm conduct under the Sherman Act and Kodak's arguably minimal technological contributions to the two projects, we believe it was quite appropriate for the jury to consider whether Kodak's refusal to permit Sylvania or GE to disclose their inventions to other camera manufacturers was unreasonable.

Accordingly, we affirm the judgment insofar as it holds Kodak liable for violating § 1 of the Sherman Act by its conduct in the flash programs. The question of appropriate damages, however, still remains.

C. *Damages*

The flipflash introduction was not the subject of a separate damage claim but rather was used as a secondary ground for the 110 camera award. Because we decided in Part III that the judgment must be reversed insofar as it allowed damages in connection with the introduction of the original 110 cameras, there must be a new trial to assess Berkey's damages arising out of the flipflash episode.

As for the magicube, Judge Frankel presented the damages claim to the jury in two parts, one for the latter half of 1970 and the other for 1971. The jury awarded Berkey $330,000, pretrebling, for lost camera sales in 1970. Judge Frankel upheld this award, and Kodak does

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[68] Kodak has waived its right to contest the charge on royalty-free licensing by failing to raise an objection below. Fed. R. Civ. P. 51.

not challenge it here. Berkey calculated its 1971 damages to be $1,759,000, but the jury awarded $1,417,330, a reduction of approximately 20%. Judge Frankel, however, granted judgment n.o.v. for Kodak on this award, and Berkey appeals.

Berkey's computation for 1971 was reached by comparing its 126 camera sales in that year to those in 1972. By then, Berkey argued, the deleterious consequences of the magicube conspiracy had dissipated, and so 1972 sales represented a fair estimate of the record Berkey's Keystone Division would have achieved the previous year had it been "at the starting line" when the magicube was introduced. The trial court, however, rejected this theory as speculative. Judge Frankel pointed out that the dramatic 400% rise in Berkey camera sales in 1972 was not due solely to an increase in the availability and popularity of Berkey's magicube camera; indeed, Berkey's 126 magicube camera sales declined substantially in 1972. Rather, the augmentation of Berkey's market share was attributable to the introduction of a new and greatly improved version of its Everflash camera, which utilized a built-in electronic strobe light rather than a disposable cube. Thus, Judge Frankel held, the comparison urged by plaintiff "invited an award of damages measured by the success of Berkey's own innovation."

Berkey contends that the judge's ruling was based on an erroneous perception that the Everflash and magicube cameras were to be regarded as noncompeting products with no impact on one another. As Berkey points out, the jury's finding of a single relevant still camera market, including all 126 cameras as well as 110s, suggests that these products do compete with each other. The strobe built into the Everflash perhaps may be regarded merely as an alternative to the magicube as a light source for

cameras that are otherwise similar. On the other hand, a Berkey executive testified that the Everflash introduced in late 1971 was a very different and markedly superior camera. These were factors that the jury was properly given to consider. Its verdict, representing a 20% deduction from Berkey's demand for 1971, suggests that it did so.[69]

Moreover, there was substantial evidence that Berkey suffered injury into 1971 as a result of the magicube conspiracy. Berkey was not able to introduce a magicube camera until late 1970, and even then its inventories remained low. Because of its haste, Berkey's original cameras were defective for some time. Where there is a basis on which a jury can reasonably infer significant antitrust injury, we should be very hesitant before determining that damages cannot be awarded. *Story Parchment Co., supra,* 282 U.S. at 561-62. On a motion for judgment n.o.v., the evidence must be viewed in the light most favorable to the party for whom the verdict was rendered, and it must be given the benefit of all reasonable inferences. *E.g., Simblest v. Maynard,* 427 F.2d 1, 4 (2d Cir. 1970). In our view, Judge Frankel gave insufficient weight to this standard.

The trial judge's decision, however, clearly represented a legitimate concern over the size of the award. It may be true, as the jury evidently found, that most Everflash buyers would have bought a magicube camera in 1972 had the strobe camera not become suddenly successful. It does not necessarily follow, however, that the magicube camera selected by most of those consumers would likely have been, as Berkey's damages theory seems to assume, a Keystone model. Accordingly, if Judge Frankel had

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[69] By contrast, the jury awarded all but $4,000 of the claimed amount for 1970.

merely ordered a remittitur on the ground that the award was excessive, we could not say that he had abused his discretion. *See Heyman v. Kline,* 456 F.2d 123, 130-31 (2d Cir. 1972). As it is, however, we reverse the grant of judgment n.o.v. and remand for retrial the question of damages for lost camera sales in 1971. In this instance, as in the others where we have directed a new trial, we hope the parties will find another means of disposition.

VI. The Peck Incident

The lengthy proceedings below were unfortunately marred by a bizarre series of events in the closing days of the trial on liability. Berkey charged that one of Kodak's attorneys had joined forces with an important witness to destroy or conceal evidence unfavorable to the defense. As the facts unfolded at several side bar conferences, the district judge granted Berkey permission to attempt to impeach the witness by cross-examining him concerning the alleged concealment. Kodak challenges this ruling, asserting irreparable prejudice in the eyes of the jury due to the tale that ultimately unfolded from the witness stand. In addition, also on grounds of prejudice, it attacks Judge Frankel's decision to admit into evidence a 1915 decision entered against Kodak in a Government antitrust suit. To explain why we believe the district judge did not abuse his broad discretion in ruling on these matters, we must set forth the events in greater detail.

Professor Merton J. Peck, a former chairman of the Yale Economics Department, was Kodak's sole expert witness. His task was to explain Kodak's view of the relevant markets and the reasons for Kodak's persistently high market shares. In April 1977, several weeks before

the trial began, Berkey availed itself of the right to depose its adversary's expert witness under Fed. R. Civ. P. 26(b)(4). Pursuant to a ruling by Magistrate Sol Schreiber, Mahlon Perkins, a Kodak attorney, furnished Berkey with several documents before the deposition commenced. These consisted of interim reports that Peck had drafted, along with Peck's appointment book for the first four months of 1977, the time sheets he kept while working as a consultant to Kodak, and a three-page summary of the materials supplied by Kodak that Peck had reviewed in preparing for his testimony. At the deposition, which was held at the offices of Berkey's counsel, Perkins represented in Peck's presence that all of the information and data upon which the witness had relied was now available to Berkey, and that there was no record of those documents Peck had read but did not utilize.

In the course of the deposition it came to light that Peck had periodically forwarded all his own notes and papers to Donovan Leisure Newton & Irvine, the law firm then representing Kodak. He explained that he had done so because the materials were covered by a confidentiality order and because he lacked the requisite storage space. Perkins then represented to Berkey that all of these documents had been destroyed—evidently before the magistrate's order—under his personal supervision. Peck averred that he could not recall when he first became aware that the documents were being destroyed, but that he continued to return material to Perkins's firm after learning that it was not being retained.

In another pretrial maneuver, Berkey sought an advisory ruling as to the admissibility of the district court opinion in *United States v. Eastman Kodak Co.*, 226 F. 62 (W.D.N.Y. 1915), *appeal dismissed*, 255 U.S. 578 (1921). In that decision, somewhat inaccurately referred

to throughout this litigation as "the 1915 decree," Kodak was found to have monopolized the amateur camera, film, and paper industries through acquisitions and other exclusionary practices. Judge Frankel ruled that the "decree" was too ancient to be probative of the current structure of the relevant markets, and that its value would be outweighed by the danger that the jury would give excessive weight to a judicial holding. *See* Fed. R. Evid. 403. The judge indicated, however, that he would reassess this decision should Kodak raise the defense that monopoly power had been "thrust upon" it.

Peck took the stand as the final witness for Kodak at the liability trial. When John Doar, lead trial counsel for Kodak and a man of national repute, asked him to explain how Kodak had obtained its market power, Alvin Stein, who has represented Berkey from the inception of this litigation, immediately asked for a conference at side bar. He argued that if Peck were allowed to testify that Kodak's strength was drawn from its innovative capacities, Berkey should be permitted to introduce the 1915 "decree," both as substantive rebuttal evidence and to impeach Peck. Judge Frankel twice offered to permit Mr. Doar to withdraw the question. When Kodak's counsel declined the invitation, the court ruled that the 1915 "decree" could be admitted as background only, representing "one source, though it is far in the past, of Kodak's power over the years." But, as Mr. Stein commenced his cross-examination of Peck, Judge Frankel reversed his course, deciding that, even considering the need to impeach Peck, the prejudicial potential of the decree overwhelmed its probative value.

On Friday, January 6, the 109th day of trial, Mr. Doar requested a ruling as to the scope of the cross-examination concerning the nonproduction and purported destruction of

Peck's work papers. Judge Frankel responded by noting that it was irrelevant to Peck's credibility whether Kodak documents that the expert had testified he merely studied and returned to defense counsel had been destroyed. The court ruled, however, that if Peck had yielded his own papers to counsel with knowledge that they might be destroyed, this fact would certainly bear on the weight of his testimony. Stein was admonished to be "low key, brief, and to the point" on cross-examination.

Mr. Stein then began to question Peck about his preparation of a memorandum dated April 21, 1975, the earliest report over his name that had been produced at the deposition. When Stein inquired if this was the earliest writing Peck had prepared for Kodak, the economist replied in the negative. The jury was excused as Kodak for the first time produced a letter dated November 25, 1974, from Peck to a member of the team of Kodak attorneys. The contents of the document, marked as PX 666, were stunning, for in it Peck admitted that he had not yet formulated a fully persuasive answer to two questions:

> 1. On what economic grounds can the 1915 court decision be rejected as irrelevant to the present situation?
>
> 2. On what economic grounds can the argument that Kodak's dominant position since 1915 is not based on superior skills be rejected?

In short, the missive, which examined various aspects of the 1915 "decree," conceded that the anticompetitive conduct found in the court's opinion could not be ruled out as at least a partial explanation of Kodak's present market position. Attempting to explain why this explosive document had not been produced earlier, Doar stated that

he did not believe it was within the scope of Magistrate Schreiber's order. Kodak had therefore never acknowledged that the letter existed.

Mr. Stein, of course, immediately requested permission to delve into Peck's knowledge of the circumstances surrounding the concealment and sudden appearance of the letter. Counsel also renewed his request that the 1915 "decree" itself be admitted into evidence to rebut Peck's assertions. Since Kodak's own expert had indicated that it might be relevant to the present day market, Judge Frankel admitted portions of the "decree" and ruled that Stein could inquire of Peck how it had come about that he had overlooked PX 666 when he stated in his deposition that he did not recall having written any letters prior to April 1975. Peck replied that he had forgotten that the letter existed. Stein then read excerpts from Peck's deposition testimony, establishing before the jury that Peck continued to send materials to Donovan Leisure after learning that they were not being preserved.

But the most striking revelation of all was still to come. Judge Frankel asked Kodak's counsel to search its files over the weekend of January 7-8 for any other relevant documents. On Monday morning, out of the presence of the jury, Mr. Doar made known his discovery that in fact all the documents that Perkins told Berkey had been destroyed still existed. Moreover, Peck, who had steadfastly maintained that his own files on the case were empty, discovered during the weekend copies of two documents—including PX 666—that he had forwarded to Kodak's attorneys. Expressing his concern over the "delicate and troublesome" issues raised by these disclosures, Judge Frankel advised the attorneys that he believed the incident bore on Peck's credibility. Accordingly, he ruled that Mr. Stein should now be permitted to cross-examine Peck on his relations with Perkins.

Stein questioned Peck in some detail. Although the economist steadfastly denied he had deliberately concealed the fact that he had studied the 1915 decision, he conceded that Berkey was kept in ignorance of the fact. Peck agreed that a Kodak attorney had probably shown him the three-page summary of the documents on which he relied before it was submitted to Berkey at his deposition. The 1915 "decree" was not on the list. At the time of Peck's deposition, Stein pointed out, the professor had failed to recall the existence of PX 666 and had denied retaining copies of any of his working papers—although his weekend search had uncovered a copy of the letter, which referred throughout to the Western District decision.

Stein also inquired into the circumstances of Peck's delivery of his papers to Perkins, and established that the material was sent to Perkins with impending discovery proceedings in mind, rather than merely because of the confidential nature of the documents. Additionally, Stein established that, although Peck had stated in his deposition of April 1977 that he did not recall when he first learned that documents were being destroyed, in fact he had discovered this fact only weeks before he was deposed. Counsel then went on to question Peck about the decree and its bearing on his testimony concerning the origins of Kodak's market position.

Kodak argues that Judge Frankel committed prejudicial error in allowing even limited reference to the 1915 court "decree," and *a fortiori* in permitting cross-examination of Peck on the subject of the alleged destruction of documents. But because the scope of cross-examination, especially when it pertains to the credibility of witnesses, is peculiarly within the province of the trial court, *see Lewis v. Baker*, 526 F.2d 470, 475 (2d Cir. 1975), and in light of the exceptional circumstances we have recited, we cannot say that Judge Frankel's rulings constituted an abuse of discretion.

As the trial court's continuing efforts to reassess the balance of prejudice and probative value of the 1915 "decree" attest, this question was not susceptible of facile resolution. But we think it clear that when PX 666 came to light the scales were decidedly tipped in favor of the limited admissibility that he approved. The Peck letter demonstrated that Kodak's lone expert witness had seriously considered the relevance of the market activities described in the 1915 "decree" to the present market structure of the industry, and that he had serious doubts whether the violations found there could be safely characterized as irrelevant to Kodak's current power in the marketplace.

We are also of the view that the cross-examination of Peck remained within permissible channels, particularly in light of the extraordinary revelations that preceded it. Peck conceded at his deposition that he continued to forward research materials to Kodak's lawyers after learning they were destroyed upon receipt, thereby providing more than a sufficient threshold showing of relevance to permit further inquiry on cross-examination. Suspicion could only have been increased by the sudden appearance of PX 666, a letter of great importance to Berkey's efforts to impeach Peck, which the writer claimed to have forgotten existed. And when Peck revealed on Monday that his files had contained a copy of this letter from the outset, deeper inquiry was certainly justified. As each new fact came to light, Judge Frankel carefully reassessed its relevance to Peck's credibility and gradually enlarged the scope of permissible inquiry into the witness's actions.

Mr. Stein's questions, therefore, far from consisting of the mere compendium of inflammatory rhetoric that Kodak describes, were legitimate challenges to Peck's credibility and to the independence of his judgment.[70] Indeed,

Judge Frankel, who throughout the unusual disclosures described here maintained an attitude of cautious restraint, noted in a colloquy with the attorneys that Peck's credibility had, in his judgment, been destroyed on the witness stand. To be sure, the jury need not have believed Berkey's argument that Peck had deliberately collaborated with Perkins in an effort to destroy or conceal documents unfavorable to Kodak's cause. But there was certainly more than an adequate basis to permit Berkey to contend that this inference was justified, and that, at best, Peck was a willing tool of Kodak.

We are not unmindful that the incidents described, as presented to the jury, led to the unfortunate consequence of casting Kodak's attorneys, and the defendant itself, in a highly unfavorable light. It is no less true, however, that the cross-examination elicited information that was highly relevant to an assessment of the independence of

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[70] A careful reading of the transcript reveals one brief interchange that was not relevant to Peck's own veracity, but only to that of Perkins himself. Peck was asked if he now was aware of the falsity of the representations Perkins made to Berkey that all the expert's papers had been destroyed. Peck replied that he did know this. Although we believe that the reference to Perkin's dissembling and Peck's present knowledge of it was immaterial, we do not think that this dialogue, or the reference to it in Mr. Stein's summation, was so prejudicial as to warrant a new trial. It was proper to argue to the jury that Peck played a role in the attempt to conceal information from Berkey, and to urge the jury to infer that Peck was either aware, or consciously chose not to recognize, that material was not in fact being destroyed, but withheld. The sole additional fact that it was Perkins who actively misrepresented the facts to Berkey was, at worst, incremental. We do not think that Kodak has met its heavy burden of demonstrating that this interchange, standing alone, caused it prejudice so severe as to call for reversal. *See, e.g., Gray v. Shell Oil Co.*, 469 F.2d 742, 751-52 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

judgment and probity of one of Kodak's principal witnesses.[71] Where the trial judge has taken great care to balance the probative value of the evidence against the prejudice that may accrue from its introduction, we think it inappropriate to substitute our judgment for his. *See Perel v. Vanderford,* 547 F.2d 278 (5th Cir. 1977); *Hood v. United States,* 365 F.2d 949, 951-52 (D.C. Cir. 1966).[72]

VII. Attorneys' Fees and Costs

Under § 4 of the Clayton Act, 15 U.S.C. § 15, the successful plaintiff in a suit for treble damages may be awarded reasonable attorneys' fees. Judge Frankel awarded $5.3 million in counsel fees, calculated essentially on the hourly rate at which counsel agreed to bill their client. Berkey, which had asked for a fee of over $30 million, contends that because the trial court failed to take into account the difficulty of the litigation, the employment opportunities foregone by counsel, and the result achieved, the reduction of its request was arbitrary and must be reconsidered by this court. Judge Frankel's computation appears to be in conformity with the agreement

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[71] *See Walker v. Firestone Tire & Rubber Co.,* 412 F.2d 60 (2d Cir. 1969) (expert may be cross examined concerning falsity of testimony in earlier unrelated trial).

[72] We have examined Kodak's other objections to the conduct of the trial and believe they are without merit. We also find insubstantial Kodak's contentions that the Sherman Act and the treble damages provision of the Clayton Act are unconstitutional on their face. Moreover, we do not think that our interpretation of the former statute has effected a fundamental alteration of the law of monopolization. Accordingly, we reject the view that the Sherman Act is unconstitutional as applied to the facts of this suit. *See generally Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 495-502 (1968).

between Berkey and Parker Chapin Flattau & Klimpl, its principal counsel in this case.[73] And were it not for our holdings on appeal we would be inclined not to disturb this award.[74] But inasmuch as we have reversed the judgment for Berkey on its single most significant claim, and have remanded other claims for a new trial, it is plain that the award of attorneys' fees must be vacated for reconsideration by the district court.[75]

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[73] In a letter dated March 4, 1976, Mr. Stein of Parker Chapin wrote to co-counsel that "the client has no commitment to any of the firms representing it in the case to pay a contingent fee or to compensate us on any measure other than time and effort expended." Moreover, despite the trial court's repeated requests, counsel failed to provide any information from which the judge could determine the size of the "success premium" Berkey allegedly agreed to pay its law firm.

[74] Because of the conclusions we have reached on appeal, we have decided not to award costs to either party.

[75] Since the question was neither briefed nor argued, we do not decide under what circumstances a court may award fees for time expended by counsel on claims that ultimately prove unsuccessful. *Compare Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490, 493 (D. Mass. 1963), *set aside on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964) *with Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478, 483 (S.D.N.Y 1970), *modified on other grounds*, 449 F2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973) *and* L. Sullivan *supra*, at 794.

Judge Frankel also awarded Berkey $343,794.97 in costs, comprising court costs taxable under 28 U.S.C. § 1920, and certain expenses incurred in taking depositions. This award must also be vacated and reconsidered by the district court. We do make two observations for the guidance of the court below. Berkey's contention that the trial court erred in refusing to allow reimbursement for expert witness fees is clearly foreclosed by our decision in *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 81 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973), in which we

(footnote continued on following page)

VIII. Summary

The disposition of this appeal may be summarized in schematic form as follows:

The Court below	*This Court's holding*
1. Awarded Berkey $45,750,000 treble damages for lost profits on 110 cameras.	Reversed.
2. Awarded Berkey $167,100 treble damages for lost photofinishing profits.	Reversed and remanded for a new trial.
3. Awarded Berkey $57,000 treble damages for excessive prices paid for photofinishing equipment.	Reversed and remanded for a new trial.
4. Awarded Berkey $34,500,000 treble damages for excessive prices paid for film.	Reversed and remanded for a new trial.

(footnote continued from preceding page)

indicated that the only costs recoverable by a successful plaintiff in a private antitrust suit are those normally allowable under 28 U.S.C. § 1920 and Fed. R. Civ. P. 54(d). *Accord, Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 224 (9th Cir), *cert denied*, 379 U.S. 880 (1964). Similarly, Berkey may not recover as costs of suit its expenditures for use of a computer retrieval service.

5. Granted judgment n.o.v. to Kodak on Berkey's claim for damages for excess prices paid for color print film ($8,803,000, pretrebling, awarded by the jury).	Reversed and remanded for a new trial.
6. Held that Kodak has violated § 1 of the Sherman Act by conspiring with Sylvania and General Electric in the introduction of the magicube and flipflash systems.	Affirmed. Because the flipflash conspiracy was not made a separate subject of damages at the first trial, a retrial is necessary to determine the resultant damages.
7. Awarded Berkey $990,000 treble damages for lost camera sales in 1970 resulting from the magicube conspiracy.	Affirmed.
8. Granted Kodak's judgment n.o.v. on Berkey's claim for damages in 1971 arising from the same conspiracy ($1,417,330, pretrebling, awarded by the jury).	Reversed and remanded for a new trial on damages only.
9. Granted Berkey equitable relief.	Vacated and remanded for further proceedings consistent with this opinion.
10. Awarded Berkey attorneys fees and costs of $5,627,209.47.	Vacated for further consideration on remand.

APPENDIX C

Memorandum on Post-Trial Motions of the District Court (dated June 16, 1978)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BERKEY PHOTO, INC., *Plaintiff*, —*against*— EASTMAN KODAK COMPANY, *Defendant*.	73 Civ. 424 (MEF)

FRANKEL, D.J.

Defendant has moved under F.R.Civ. P. 50(b) for judgment notwithstanding the jury's verdicts. Plaintiff has moved for numerous and detailed kinds of injunctive relief, including some divestitures, provisions for predisclosure, and various restrictions on Kodak's business procedures and practices. It is convenient to treat both motions together and to record some pertinent observations on both in this single memorandum.

I. DEFENDANT'S MOTION FOR JUDGMENT N.O.V.[1]

Many of the issues canvassed in the briefs on this motion were considered at length during the trial, in conversations

[1] Plaintiff tenders the stunning suggestion that Kodak waived the right to make this motion by failing to move for a directed verdict at the end of both trial phases. As reflected, however, by the consultations preparing a briefing schedule for the instant motion, the record amply protects Kodak in this respect.

on the record, and the resolutions reached by the court are largely reflected in the charges to the jury. It does not seem useful for *nisi prius* purposes to rehearse all the problems again in this writing. Nor is it necessary to discuss the legal standard, not in dispute, for granting judgment notwithstanding the verdict. See *National Auto Brokers Corp.* v. *General Motors Corp.*, No. 160, slip op. at 2082 (2d Cir. March 20, 1978). Accordingly, as to the portions of defendant's motion which are being denied, the court will limit its observations herein to a relatively few matters of possible further interest. On the claims with respect to which the motion is being granted, the result of which will be to reduce the total award from $37,620,130 to $27,154,700, the court will of course state the reasons why the jury's verdict is found now to be vulnerable to this extent.

110 CAMERAS

The largest single item of damages awarded by the jury was for Berkey's lost profits, $15,250,000, resulting from Kodak's unlawful monopolization and attempt to monopolize the amateur camera market. The predominant part of the evidence supporting this claim dealt with the introduction of the 110 camera line as part of a system of interdependent photographic products, without prior disclosure to competing camera manufacturers of the information about the new Kodacolor II film format that would have enabled these other manufacturers to enter the market at about the same time as, and compete on the merits with, Kodak's initial line of 110 cameras.

For the most part, defendant's contentions on this score, as it observes, retrace ground plowed earlier in denying defendant's motion for summary judgment and formulating the charge to the jury. This reflects a superficially bemusing situation: that despite the length of the trial, the basic

historical facts on this, as on many aspects of the case, are not in significant dispute. Without recounting these facts in detail, we may note that the jury undoubtedly found that defendant resolved some years before the 110 introduction to introduce the new camera and film, made to work with each other, and designed to displace with overwhelming suddenness huge segments of the market for 126 cameras. Defendant's responsible executives determined that the simultaneity of these introductions was to be the key weapon against competitors, brushing aside technical objections that the new film was unsatisfactory, inferior to the predecessor Kodacolor X in vital respects, and requiring further research and development to become a satisfactory product. The paramount strategy and goal were thus to use the film monopoly—Kodak's power in a field where its market share consistently exceeded 80%—as a lever for suddenly swelling defendant's power in the camera market, achieving there at least a temporary total monopoly of a vital new segment to be created by the system introduction. Some "responsible persons" within Kodak urged unsuccessfully that predisclosure concerning the new film format be given to camera competitors (as well as photofinishers and photofinishing equipment makers) so that they would not suffer in one blow the instant obsolescence of inventories and work in progress and the inability to compete at all with their cameras in the terrain of the newly announced system. The 110 announcement came substantially as a surprise, following some minimal predisclosures, for a price, two or three months earlier. And these events, it is worth mentioning, "followed hard after a magicube coup in June of 1970, when Kodak gained a similar advantage of surprise and temporary exclusivity from what the jury found, and the court entirely agrees, was an unlawful combination in restraint of trade with Sylvania."

Appendix C—Memorandum on Post-Trial Motions of the District Court

Without dwelling further on the facts of a huge record leading to the jury's award, the court refers briefly to some recurrent arguments defendant has pressed on this subject and sketches the reasons why they have been, and are once again, rejected.

1. *The claim of immunity per se for product introductions*

Throughout the case, defendant has urged, and it urges once more, that a company's introduction of a new product —though the company be a huge one like Kodak with monopoly power in a mosaic of interconnected markets, and though the introduction be designed deliberately to employ monopoly power in one market to create or enhance such power in another—must "as a matter of law" be immune from attack under the antitrust laws. If this is sound law, defendant should indeed be relieved of the verdict with respect to 110 camera damages. The court remains persuaded, however, that there is no such enclave for "product introductions," and that the mode, purpose, and impact of product introductions may, as in this case, play central parts in findings of unlawful monopolization and attempts to monopolize, no less than other, ordinarily lawful and "normal" business activities like leasing rather than selling machinery, *United States* v. *United Shoe Machinery Co.*, 110 F. Supp. 295, 344 (D.Mass. 1953), aff'd per curiam 347 U.S. 521 (1954), the creation of useful resources for added productive capacity, *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 430-31 (2d Cir. 1945), or the discount offered on used equipment and the adoption of separate charges for separate services condemned as exclusionary in *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F. 2d 488, 499-503 (9th Cir. 1977), cert. denied, 46 U.S.L.W. 3453 (1978).

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Before *United Shoe* and *Alcoa,* arguments similar to Kodak's could have been mounted with respect to the practices of defendants there involved—leasing, building capacity, etc. Indeed, they were made. Thus, in the *United Shoe* case, seeking reversal of Judge Wyzanski's historic ruling, the appellant company accepted the restrictions the *Alcoa* case had placed upon it as a dominant firm but assailed bitterly the notion that leasing of machinery could be the basis for a judgment against it. United Shoe complained of being condemned for its decision merely "to continue a business policy which it found in existence at its birth."[2] It noted that this was "the policy of its more important American competitors,"[3] that it was among United's familiar practices "which are traditional, natural and normal,"[4] and that allowing such practices to be outlawed after years of use would subject every dominant company to the threat of unpredictable, restrospective, destructive judgments by judges and juries.[5] That plea was unavailing; leasing practices were held subject to scrutiny and capable of being proscribed in a proper case as exclusionary techniques in the hands of a company with monopoly power. Kodak accepts that, as it must, but would draw the line now at product introductions. To reject that position does not mean, of course, that Kodak's product innovation techniques are *ipso facto* to be denounced. It means merely that they were open to informed inspection in this case, in the setting of all the circumstances of

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[2] Brief for Appellant at 90, *United Shoe Machinery Corp.* v. *United States,* 347 U.S. 521 (1954) (per curiam).

[3] Id.

[4] Id.

[5] See id. at 101 *et seq.*

Kodak's power and practices, and that the jury could well have found (as the court would have found) anticompetitive uses by Kodak of its monopoly power in the manner and timing of its product system introductions.

There are few mechanical rules to take the place of informed judgment in the enforcement of the antitrust laws. While *per se* rules *of liability* are useful and comfortable where they exist, the task usually is to weigh "all of the circumstances of a case" to determine whether a company has engaged in unlawfully anticompetitve practices. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). The ultimate judgment, as in the cited case, must commonly rest "upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Id.* at 59. So, here, the jury was commissioned and instructed to appraise all the facts and circumstances and decide whether the manner, timing, and effects of the 110 introduction amounted to the anticompetitive employment of monopoly power not merely "to gain a competitive advantage," *United States* v. *Griffith*, 334 U.S. 100, 107 (1948), but to attempt unlawfully to monopolize, and to monopolize, another market. The court is compelled to conclude that the record and the law wholly justified the verdict in this aspect against Kodak.

Under the law, generally speaking, the inquiry required appraisal of all Kodak's relevant behavior to determine whether that behavior should be accepted as no more than

> "the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production, and distribution, which a competitive society must foster."

United Shoe, supra, 110 F. Supp. at 344, or whether Berkey has shown by a preponderance of the evidence that Kodak

had proceeded by

> "contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further[ed] the dominance of a particular firm."

Id. at 344-45. In other words, the jury was required to appraise whether Kodak's conduct represented what Judge Learned Hand labeled "exclusionary" practices. *Alcoa, supra,* 148 F.2d at 431. The charge to the jury was framed to define the inquiry along the lines of the important *Alcoa* and *United Shoe* precedents.[6]

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[6] "In order to sustain the charge of unlawful monopolization, Berkey must have established by a preponderance of the evidence three essential elements: (1) that Kodak at relevant times possessed monopoly power in a relevant market; (2) that Kodak acquired this power or maintained it by exclusionary or anticompetitive means or used it for exclusionary or anticompetitive purposes; and (3) that Berkey suffered injury in its business as a result of Kodak's monopoly power and exclusionary or anticompetitive conduct." (Tr. 16333).

"You must draw a distinction here between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well run business, or luck, on the other." (Tr. 16367).

"The kind of conduct which concerns us here is conduct which unnecessarily excludes or handicaps competitors. This is conduct which does not benefit consumers by making a better product or services available, or in other ways, and instead has the effect of impairing competition. To sum up, your task is to determine whether Kodak gained, maintained, or used monopoly power in a relevant market by arrangements and policies which instead of encouraging competition, were designed primarily to further Kodak's domination of the market." (Tr. 16367-68).

"It can sometimes be difficult to determine the primary quality or nature of an act so as to classify it as either honestly industrial or as exclusionary or anticompetitive. Nevertheless you must be the judge. Given conduct may both help customers and hurt competi-

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Beyond that, the case came into a sharper, more specific focus, so to speak, because the evidence tended powerfully to support plaintiff's theory of unlawful "leveraging." It is unnecessary to speculate whether plaintiff might have been entitled to a directed verdict on this score. It is sufficient to say that the evidence showed a carefully orchestrated program by defendant to use its film monopoly so as to obstruct and frustrate competition on the merits in the camera market. The 110 introduction was timed and arranged so that when the new film format appeared, no other camera manufacturer would be in a position to offer the consumer a camera other than Kodak's for use with that film. Kodak was to be, and in the event was, alone

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tors. If this seems to be the case to you, you must ask yourselves whether it hurts competitors precisely because it appeals to consumers. That is, was the harm to competitors caused by customers' preference for the defendant's products? If so, the kind of conduct involved is not exclusionary or anticompetitive because the goal of Section 2 is to protect competition itself rather than a particular competitor's right to thrive. If a business does poorly because it is faced with vigorous competition, this is not unlawful. However, if the harm to competitors is caused by something other than the defendant's success in competing on the merits of its products and operations—if the harm is caused primarily or substantially by the defendant's deliberate efforts to injure or block competition—then you may find that the conduct was anticompetitive." (Tr. 16368-69).

"There is no law that makes it illegal to introduce products which are physically dependent on each other, at least under ordinary circumstances. However, if you find Kodak possessed monopoly power in film or in cameras, and if you conclude based on all the evidence that in either instance the decision to introduce products in the form of a system was primarily dictated neither by technological necessity nor by a desire to serve the needs of customers, you may find that Kodak engaged in exclusionary conduct in the camera market, the film market or markets, the color print paper market or all of these." (Tr. 16383).

in the field, with its competitors paralyzed and consumers deprived of choice. This may not be, as Kodak stresses, an exact duplicate of *United States* v. *Griffith, supra.* But it seems to this court to fall squarely within the principles of that authority. Other precedents are to similar effect. *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 377 (1973); *Sargent-Welch Scientific Co.* v. *Ventron Corp.,* 567 F. 2d 701, 713 (7th Cir. 1977). And plaintiff is on the mark, in this court's view, in invoking tie-in cases as cognate authority, to accentuate the fundamental animus of the antitrust law against the "use of economic power in one market to restrict competition on the merits in another, regardless of the source from which the power is derived. . . ." *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 11 (1958).

It does not advance the inquiry, but only begs the question, to protest, as defendant has throughout that product introductions involve "necessary commercial decisions," "natural advantages," or "normal and lawful business practice."[7] The contentions so phrased assume facts contrary to what the jury could, and probably did, find. The charge left the jury to decide whether such characterizations fairly described what Kodak had done. The verdict implies, and the court would have given, a negative answer.

Defendant is not helped by protesting that under the law applied in this case "all product announcements by companies with large market positions are at risk without any legal standards to guide the businessman as to when and how and under what circumstances to bring out new products to market."[8] It is at least a little demure for defendant to describe itself as a mere company with a

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[7] Memorandum in Support of Motion 6, 26, 21.

[8] Memorandum in Support of Motion 6.

"large market position." Kodak is, as the jury found and its counsel early observed, a "giant," with a nearly unique agglomeration of enormous powers over adjoining markets in a huge industry. Thus, the problem does not arise here in a way that ought to be of desperate concern to some uncertain class of "companies with large market positions. . . ." Overlooking that it has been found on compelling evidence to be a monopolist in an array of markets, Kodak also overlooks that monopolies are not darlings of the antitrust laws. Whatever supposed uncertainties inhere in the standards applied in this case—and it must be conceded surely that there are some—these standards would appear to be, if anything, more lenient toward Kodak than the stringent rule of *Alcoa,* allowing a monopolist to avoid illegality only if it could show that the disfavored position of power had been "thrust upon" it as a result of its superior business acumen or skill in the relevant market. Far from approaching a showing to satisfy that standard, the evidence reveals a monopolist in one market (film) engineering that power to thrust itself into a monopoly position in a second market (cameras). The result was a world away from being "economically inevitable," *United Shoe,* 110 F.Supp. at 345; it was plainly avoidable, and the means Kodak chose to employ were plainly to be shunned.

Kodak's complaint at root is that it faces liability for conduct which other business firms, lacking monopoly power, engage in regularly with impunity. Even if the factual premise were to be credited, the short answer is that the antitrust laws do not permit willful maintenance of monopoly power by conduct that might for a company without such power be deemed "honestly industrial." *Alcoa, supra,* 148 F.2d at 431; *United Shoe, supra,* 110 F. Supp. at 344. The present case illustrates the now settled rule that "[t]here are kinds of acts which would be lawful in the

absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under § 2 if done by a monopolist. . . ." *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, 567 F.2d 701, 711-12 (7th Cir. 1977).

2. *Predisclosure*

Plaintiff's theory on the camera monopoly claim included the contention that if defendant had given them advance information about the size and other pertinent qualities of the new Kodacolor II film, other camera manufacturers, including plaintiff, could have geared up to be ready to compete on the merits with Kodak in offering cameras suitable for use with the new film. Treating this aspect of the claim, the court cautioned the jury that a company normally has a perfect right to keep its secrets, winning competitive advantages by launching new and better products in its own way and in its own time. Undertaking, however, to apply the teachings of the authorities on section 2 of the Sherman Act, the court went on to instruct that Kodak's monopoly power in film, if it was found to disable competitors who could not offer cameras comparable to Kodak's, might lead the judges of the facts to decide that the failure to give camera makers the necessary predisclosure concerning film should in all the circumstances be deemed anticompetitive.[9] These instructions applied to a

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[9] "Standing alone, the fact that Kodak did not give advance warning of its new products to competitors would not entitle you to find that this conduct was exclusionary. Ordinarily a manufacturer has no duty to predisclose its new products in this fashion. It is an ordinary and acceptable business practice to keep one's new de-

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record on which the jury could readily have found among other things: (1) that Kodak timed the 110 system to cope with the inroads its competition was making in the 126 camera market, not as a result of the pace of design evolution; (2) that the simultaneous offering of a new color print film was a use of the film monopoly to gain a competitive jump, not a genuine improvement or benefit to consumers; (3) that the anticompetitive purpose and effect of the introduction could be inferred from evidence that the new products were inferior in important respects, including, notably, the "red eye" problems, which Kodak took pains to conceal, beginning with the carefully planned lighting arrangements at the gala press conference called to launch the new system; and (4) that the highly publicized new Kodacolor II was restricted for a critical interval of time to the 110 format, for which only Kodak could supply cameras, for that anticompetitive purpose alone, not because of any technological or legitimately commercial concerns counseling this timetable.

Without disputing the foregoing facts and others from which the jury could have found the 110 introduction a scheme contrived almost wholly to crush competitors, and scarcely or not at all to compete by serving consumers better, defendant preserves its position that failure to predisclose could not as a matter of law go before the jury as a possible material factor. The argument, characteris-

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velopments a secret. However, if you find that Kodak had monopoly power in cameras or in film, and if you find that this power was so great as to make it impossible for a competitor to compete with Kodak in the camera market unless it could offer products similar to Kodak's, you may decide whether in the light of other conduct you determine to be anticompetitive, Kodak's failure to predisclose was on balance an exclusionary course of conduct." (Tr. 16392).

tically robust and uncompromising, is that "the law," according to Kodak, "leaves to Kodak, acting in its own commercial interest, the decision when and how to bring its products to market."[10]

That extends the line Kodak has sought to have drawn throughout the case. The court adheres to the view that defendant is in error.[11] Again, the court perceives the principles of the Sherman Act and the pertinent precedents as demanding a frequently subtle, inevitably comprehensive appraisal of actions by a company like Kodak wielding enormous monopoly power. Given such power, we were reminded not long ago, it becomes an essential question whether the evidence shows "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Here, then, plaintiff was entitled to have the triers of fact consider whether, in the total setting portrayed by a long record, an inference of "willful acquistion or maintenance" might be promoted or strengthened by the deliberate decision to keep secret the plan to use the combination of monopoly powers so that camera makers would be blocked for a substantial time from competing at all for the custom of amateurs who would want the "remarkable new" Kodacolor II film and would be

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[10] Memorandum in Support of Motion 7.

[11] The claim that the existence of rights secured to innovators under patent and trade secret laws mandates a different result is not persuasive. Far from creating a total screen against the application of the antitrust laws, the rules on patents and trade secrets allow a limited exception to a general rule against monopoly. *Transparent-Wrap Machinery Corp.* v. *Stokes & Smith Co.*, 329 U.S. 637, 640-41 (1947); *Precision Instrument Manufacturing Co.* v. *Automatic Maintenance Machinery Co.*, 324 U.S. 806, 816 (1945).

forced to deal with Kodak alone as the purveyor of "the film that was made for the camera that was made for the film."

3. *Business decisions and product quality*

On legal reasoning essentially like that affecting pre-disclosure, the court continues to reject defendant's thesis that the jury should not have been permitted to appraise "business judgments" as to whether a new product is adequate and when to introduce it. As we approach the Sherman Act's centennial, it seems extraordinary to suggest that conduct questioned under that broad enactment may be shielded from scrutiny because it results from "business judgments." This was not so for the decision to lease rather than sell in *United Shoe* or for the countless business decisions that have been evaluated, whether to condemn or absolve, in antitrust cases. It seems equally clear that there is no legal shield covering questions of product quality. Turning no farther back than the quotation just above from *Grinnell,* we see it was a material question in the present case, as in others, whether Kodak's accession of increased monopoly power through the 110 system could be attributed to a "superior product." The jury was properly permitted, the court reaffirms, if not required, to appraise the 110 system for this purpose: to think whether the new film was somehow superior, and to evaluate in that light the new camera as well—whether *it* was "superior," or whether, perhaps, the ultimately decisive thing about the camera was its being designed to be protected in the market from any direct comparisons or competition of any kind.

The jury was cautioned at some length that it did not sit to second-guess business judgments as such, and that the quality of Kodak's products was not a concern in the case

for its own sake.[12] The only question in this quarter given to the triers of fact was the possibly difficult, but seemingly appropriate one of determining if the relative character of the products in question might cast light on whether the securing of monopoly power in the camera market was a natural and innocent business development or the kind of willful acquisition condemned by *Grinnell* and other cases.

4. *Intent*

The final quarrel to be mentioned in connection with the 110 camera award is that it was error to allow the jury to consider evidence of Kodak's intent as reflected in statements of its responsible people. In treating this matter, the court recalls the sharply limited extent and purpose for which the jury was permitted to examine intent, if it reached this subject at all. Under the court's charge, evidence of this nature was to be scrutinized only if it was not feasible otherwise to decide whether particular conduct

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[12] "Kodak had no obligation under the antitrust laws to see that a new product was superior to the old. That question of quality, *in and of itself*, is not in issue here. Berkey's thesis in this respect is that the new products were introduced so as to unbalance competition—obsoleting prior systems such as the 126, and postponing competitors' chances to compete for the sale of the new systems, rather than to give consumers something genuinely better. The attempt to show that a new product such as Kodacolor II was not an improvement over existing products is made as a part of the effort to prove this claim. Of course, it is for you the jury to decide along the way whether the evidence shows that the new products were inferior, superior, or essentially comparable. But remember that this is not an ultimate question for its own sake. The ultimate question to which it goes is whether the new product introductions were primarily a form of honestly industrial competition, designed to produce something more attractive for the customer, or primarily exclusionary and anticompetitive in the sense of these terms which is now familiar to you." (Tr. 16389).

on Kodak's part should be deemed "either honestly industrial or anticompetitive."[13]

The court finds it difficult on the authorities to comprehend the claimed impropriety of this limited reference to motivation and purpose as a potentially relevant circumstance in determining whether conduct should be held unlaw-

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[13] "In some cases where it is not immediately apparent whether particular conduct which Berkey has complained about is exclusionary, you will be required to determine whether the conduct is primarily an effort to attract customers or primarily an effort to undermine competitors. In these situations, you may consider the evidence bearing on Kodak's motivation and objectives to help you ascertain the primary thrust of the conduct in question.

"In these cases the question is not whether Kodak specifically intended to attain the end result of monopoly power. Berkey does not have to prove that in order to establish monopolization. On the other hand, a mere showing that Kodak intended to do the actual things it did may not be sufficient to show whether or not the actions were anticompetitive. The issue may then be whether the primary objective pursued by Kodak management in engaging in the conduct was exclusionary or predominantly customer-oriented.

"Some conduct may speak for itself; that is, it is only capable of being understood in one way, whether this be as exclusionary or as honestly competitive. Other conduct may be harder to evaluate. It is in cases of the latter sort that evidence of purpose or motivation may help you tell whether the conduct was exclusionary.

"Since Kodak is a corporation, rather than a living person, it can only act through its officers and employees. Similarly, it is only these officers and employees who have an intent in the sense in which we ordinarily use the term. Therefore, if you have any doubt as to whether particular conduct is exclusionary in a given relevant market, you may consider the intent of these people in making your decision. However, you may only consider the expressed intentions of an individual Kodak officer or employee as to a subject which was within his area of authority. For example, you would not accept an expression of intention by an ordinary

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fully restrictive or anticompetitive under the Sherman Act. At least since *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918), as reaffirmed no longer ago than *Continental T.V., Inc.* v. *GTE Sylvania Inc., supra,* 433 U.S. at 49 n.15, we have been taught in this setting that "knowledge of intent may help the court to interpret facts and predict consequences." We are to look, or the jury is to look, as noted repeatedly herein, for evidences of "willful acquisition" of monopoly power. And these quotations reflect an elementary premise that pervades the law, criminal and civil—that intent, motive, or purpose is often a prime clue to adequate understanding and characterization of conduct otherwise equivocal. See also *Sargent-Welch Scientific Co., supra,* 567 F.2d at 712.

The limited reference to motive or purpose in this case is entirely consistent with the law that intent need not be proved to establish an unlawful monopoly. *Alcoa, supra,* 148 F.2d at 431-32. It is a primitive logical fallacy to infer from this that "subjective intent" (Kodak's phrase) *may not* be shown to illumine conduct which, apart from purpose and the market power of the party, may appear, in Kodak's contrasting phrase, to have "violated none of the objective precepts of the antitrust laws."[14]

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worker on a Kodak assembly line as an authoritative indication of the intent behind Kodak's introduction of the 110 system. When you consider evidence of intent for the purpose of evaluating whether Kodak's conduct was exclusionary, you need not find that the individuals intended to achieve the ultimate result: monopolization. It is enough for you to find that the conduct was intended to exclude or forestall or injure competition for you to adjudge such ambiguous conduct to be exclusionary. I repeat that if the conduct was clearly exclusionary, or clearly innocent, you need not even consider the intentions of individual officers and employees of Kodak for this purpose." (Tr. 16370-72).

[14] Memorandum in Support of Motion 9, 10.

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Judge Hand did not hesitate to consult indicia of intent when faced with the need to evaluate equivocal conduct in *Alcoa*. See 148 F.2d at 432-33. That approach, properly understood, leaves ample room for the view, for which defendant cites Professors Areeda and Turner, that a company with monopoly power is not barred from competing, or from intending to do so:

> "There is at least one kind of intent that the proscribed 'specific intent' clearly cannot include: the mere intention to prevail over one's rivals. To declare that intention unlawful would defeat the antitrust goal of encouraging competition on the merits, which is heavily motivated by such an intent."[15]

The court agrees—indeed, with deference, deems it obvious—that "the mere intention to prevail over one's rivals" is "one kind of intent" outside the "specific intent" required to show an attempt to monopolize proscribed by section 2.[16] But the very quotation thus invoked by defendant (referring to "one kind of intent") reminds us that there are other kinds of "intent" that are, or may well be, germane in deciding what conduct is "anticompetitive" (a question arising under section 1 or section 2) and what is the forbidden goal or purpose of an attempt under section 2. The species of "mere intention" referred to by Messrs. Areeda and Turner was not permitted to be held wrongful, or the basis for adverse inferences, in the instructions defendant attacks.

Without pursuing further the lesser issues tendered again on this topic, the court records that the verdict for lost profits on 110 cameras will be sustained.

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[15] P. Areeda & D. Turner, Antitrust Law § 822a, at 314 (1978).

[16] It should perhaps be noted, though Kodak tends to slight this, that the jury found an attempt to monopolize the camera market.

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KODACOLOR II PHOTOFINISHING DAMAGES

The jury found, on unquestionably sufficient evidence, that defendant had used its film monopoly—itself unlawfully maintained, as the jury also found—to injure plaintiff as a photofinisher. Under the court's charge, it was essential to this finding that the jury condemned "Kodak's mode of introducing the 110 system without predisclosure to photofinishers . . . [as] exclusionary or anticompetitive conduct unlawfully affecting Berkey and other competing photofinishers. . . ." That determination emerged from circumstances that included a pattern of dealing with photofinishers by which Kodak kept these enterprises relatively small, numerous, dependent upon Kodak, subject to shocks and shifts of their business resulting from sudden changes in Kodak's film operations, and almost inevitably inferior to, and less informed than, Kodak's own Color Print and Processing organization ("CP&P").

Without disputing the factual basis for this finding of liability, and the award of $55,700 in damages for this, defendant argues two grounds of law for setting aside this portion of the verdict:

> (1) That the failure to predisclose, notwithstanding the circumstances in which it was shown, could not in law be a basis for liability.
>
> (2) That the finding of illegality cannot stand in the face of the jury's findings that Kodak had neither monopolized nor attempted to monopolize the photofinishing market.

The legal issue as to predisclosure, though its factual cast is different, is largely the same in this connection as in the dispute about 110 cameras. Like the camera manufac-

turers, photofinishers lived under the shadow, and at the mercy, of Kodak's omnipotent film monopoly. Like defendant's camera manufacturing division, its processing organization was secretly informed, and specially prepared, to process the new film promptly after its arrival on the market. Other finishers were left to scramble to catch up; were offered only equipment markedly inferior to CP&P's;[17] continued to be kept ignorant of technical facts and developments needed for maximally effective performance of the finishing service; were barred from competing while CP&P enjoyed a temporary monopoly; and had to watch helplessly as CP&P's reputation for preeminence was enhanced, not only by being first and best informed, but also by being needed for some time to process the other finishers' Kodacolor II orders and by being enabled to employ this opportunity to stuff these competitors' return envelopes to customers with Kodak CP&P advertising literature. Once more, the general proposition that predisclosure of new products is not required is subject to modification, as the jury found, when it is tested by circumstances of market power like Kodak's, capable of paralyzing impacts upon adjoining sectors of the economy.

While the subject is not wholly free from doubt, the court also concludes, not only under *United States* v. *Griffith*, 334 U.S. 100 (1948), but on broader principles of tort and antitrust law, that Kodak could properly be held answerable in damages for the proximate injuries to Berkey in photofinishing despite the decision that Kodak had not monopolized or attempted to monopolize this mar-

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[17] There were some light, and illuminating, moments at the trial when a Kodak technician went through a series of fumblings and contretemps attempting to demonstrate in the lighted courtroom a Kodak processing machine sold to independent photofinishers for employment in total darkness.

ket. *Griffith,* in explicit language and ultimate implications, denounces use of monopoly power, even when lawfully acquired, not merely "to beget monopoly," 334 U.S. at 108, but also "to foreclose competition . . . [or] to gain a competitive advantage," *id.* at 107. Beyond that, it accords with general principles of law that the offense of unlawful monopolization or attempted monopolization should entail liability for proximate consequences. See *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 488-89 (1968). Cf. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 485-89 (1977); Restatement (Second) of Torts § 431 (1965). Accordingly, the jury's finding that these violations in the film market caused Berkey's photofinishing injuries sustains the award for the latter. And that, finally, is merely a literal and standard application of section 4 of the Clayton Act, 15 U.S.C. § 15, which provides that anyone

> "injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ."

The photofinishing award will, therefore, be sustained.

THE MAGICUBE AWARD

The jury awarded a total of $1,747,330 on Berkey's claims of lost profits in 1970 and 1971 resulting from the joint development program between Kodak and Sylvania culminating in the simultaneous introduction in June 1970 of Sylvania's magicube and Kodak's cameras, unique for at least the time being, constructed to employ the magicube. The award is attacked both on the ground that there could be no liability as a matter of law and on the further ground

that the evidence was insufficient to sustain the damage award. The latter contention is sustained to the extent that the court now finds no sufficient evidence on which the jury, answering question 5 on damages, should have been permitted to make its award for the year 1971 in the amount of $1,417,330. The prior award of $330,000 on this branch of the case, for 1970, is left to stand.

As for liability, under both section 1 and section 2 of the Sherman Act, plaintiff defends on several theories. Without reviewing them all, the court notes a central core of scarcely disputed facts upon which the jury must have found, and the court itself would surely have found, a restraint to be denounced under the rule of reason and a form of exclusionary conduct supporting the finding of liability under section 2. It is hardly crucial, though it is much discussed by defendant, whether and to what extent Kodak and Sylvania were potential competitors. The heart of the matter, to summarize very briefly the compelling evidence on this subject, begins with Kodak's commanding position of monopoly power over key components of the amateur photographic industry—the cameras (to use the proposed flash devices), film, and color print paper. It was that dominant position, the jury could have found, that brought Sylvania to Kodak, ready to share its secrets and, under Kodak's pressure, to withhold them from Kodak's competitors in the manufacture of cameras. The jury could scarcely have failed to find, from the documentary and other evidence, that Kodak employed its power to pressure Sylvania and postpone the latter's explicit desire to furnish information concerning the flash device to other camera makers so that they might be less far behind—or, as Kodak effectively meant to avoid, abreast of Kodak—when the race to sell cameras fitted for the magicube began. Sylvania's yearning to be more forthcoming was heightened

by its prior flashcube experience and the bitterness of Kodak's competitors when a similar regime of secrecy was enforced with respect to that earlier device. Kodak's insistence was effective. Sylvania's responses to inquiries from equipment manufacturers were carefully limited, thus helping defendant further to entrench its monopoly position by coming forth first, and remaining alone in the field for crucial months, in the sale of magicube cameras.

Adding to this central core of sharply and deliberately restrictive behavior in its combination with Sylvania, Kodak extracted patent rights in Sylvania inventions broader than Sylvania wished to give, and more effective as obstacles to other camera manufacturers.

If there is no exact case in point, there are apt analogies to teach that exclusionary arrangements in concert may be found unlawful restraints of trade without regard to Kodak's insistent premise that the parties acting in combinaton must be found to have been in a relationship of "horizontal" competition.[18]

Even if the precedents were less persuasive, it is not good antitrust doctrine to demand cases squarely in point as preconditions for applyng the basic principles under a rule of reason. See *Continental T.V., Inc.* v. *GTE Sylvania Inc.*

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[18] Cf. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969); *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 (1958); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949). The cited cases, and numerous others dealing with exclusionary arrangements among non-competitors, demonstrate that such transactions may be barred under section 1 of the Sherman Act, or under the less stringent standards of sections 3 and 7 of the Clayton Act, if they "foreclos[e] the competitors of either party from a segment of the market otherwise open to them . . .," thereby acting as "a 'clog on competition' . . . which 'deprive[s] rivals of a fair opportunity to compete.'" *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 324 (1962) (Citations omitted.)

433 U.S. 36, 49 (1977).[19] In sum, the court adheres to the premises of the charge to the jury in sustaining the finding of liability for the Sylvania-Kodak secret combination relating to magicubes.

As for damages, Berkey should keep its verdict for the latter half of 1970. Delayed until August, and forced to proceed in ruinous haste to be on the market even that early, Berkey offered adequate evidence and a tenable theory to justify the award of $330,000 for that period.

The award for 1971 is another story. Troubled on this score before the jury went to work, the court separated the two periods to enable effective reconsideration at a later time if necessary. Arrived at the later time, the court concludes that this portion of the verdict cannot be sustained.

It is doubtful whether and how on this record the jury could have made any measure that is more than speculation in arriving at a supposed amount of damages for any proximate injuries extending into 1971. Plaintiff proposed that the alleged losses for that year could reasonably be assessed by comparng its sales in 1972, when the injurious effects of the magicube introduction were said to have abated, with its sales in 1971. The difference was claimed on summation to represent a fair estimate of the number of additional cameras Berkey would have sold in the earlier year had Keystone been "permitted to get to the starting line with Kodak at the time Sylvania introduced Magicube." (Tr. 18708).

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[19] "The traditional framework of analysis under § 1 of the Sherman Act is familiar and does not require extended discussion. Section 1 prohibits '[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce.' Since the early years of this century a judicial gloss on this statutory language has established the 'rule of reason' as the prevailing standard of analysis. . . . Under this rule, the factfinder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." (Footnote omitted.)

Appendix C—Memorandum on Post-Trial Motions of the District Court

The sales figures supplied did indeed reflect dramatic growth in sales, but they embraced *all* of plaintiff's 126 still cameras, including 126 flashcube cameras and the Keystone Everflash, introduced during the last quarter of 1971, which used neither a flashcube nor a magicube but rather an electronic strobe. Plaintiff's evidence showed that its 126 magicube camera sales actually *declined* in 1972 by over 67,000 units, and its flashcube camera sales similarly dropped by almost 25,000. The overall increment in sales recorded in 1972 thus reflected only the increase in sales, over 400%, of Keystone electronic flash cameras, a market success not proved to be in any way related to the overcoming of the adverse impact of the magicube introduction.

The comparison urged therefore could not have measured, even approximately, what it purported to measure. It invited an award of damages measured by the success of Berkey's own innovation, a criterion which is seen upon reexamination to lack any rational relationship to any wrong for which Kodak may be held liable. In short, the evidence relating to the year 1971 did not afford the jury "evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference." *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U.S. 359, 379 (1927). The portion of the verdict based upon it cannot be permitted to stand.

FILM OVERCHARGES

Two substantial contentions by defendant concerning the film overchage award of $11,500,000 merit attention here. First, defendant says that conceding *arguendo* the evidence showed use of its monopoly power in film to extend its power over *other* markets (cameras, photofinishing, etc.), there was not evidence of anticompetitive conduct to maintain or employ the film monopoly itself, and that this pre-

cludes any recovery for allegedly excessive film prices. The court assumes for present purposes that a showing of anti-competitive conduct *affecting the film market* was essential to Berkey's case.[20] Accepting this assumption, Kodak's argument does not prevail.

Defendant correctly describes as a central theme in Berkey's case the attacks on the use of Kodak film power for leveraging in other markets. There was also ample evidence, however, of anticompetitive actions serving to maintain the steadily huge share Kodak enjoyed of the film

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[20] The assumption does not seem compelled by any unambiguous authority, nor inevitable on fundamental antitrust conceptions. The law tolerates "lawful" monopolies, but scarcely cherishes them. The drawback in any monopoly is its regrettable exception to the primary value of competitive enterprise. The regret stems from the intertwined evils of monopoly: power to exclude competition and, as its corollary and ultimate mischief, power to set *prices* unrestrained by competitors. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States* v. *DuPont & Co.*, 351 U.S. 377, 391 (1956). Where a monopolist becomes an unlawful monopolist by engaging in exclusionary or anticompetitive conduct, the injured customer paying the monopolist's price, if it exceeds what a competitive price would be, could argue strongly for a right of recovery whether or not the anticompetitive conduct of the monopolist is "in" the same market or is "merely" aimed at unlawful results in some related market, as in *United States* v. *Griffith*, 334 U.S. 100 (1948). It would appear not to offend, but rather to buttress, Sherman Act policies to fasten liability upon an unlawful monopoly for achieving the ultimate wrong of charging a monopolist's excessive prices. As appears below, however, it has not seemed necessary to go this far in the instant case with respect to film. Later, with respect to color print paper, the court again eschews that possible extension. There, the finding as to liability as well as damages is held infirm. While one misuse of the power over color paper by leveraging in another market is sustained, this is found insufficient either to hold Kodak liable or to justify exacting of damages for asserted overcharges on the paper. It is not in any event an instance of anticompetitive conduct to acquire or maintain monopoly *within* the relevant market.

market. Without exploring, or necessarily accepting, all the kinds of conduct plaintiff would characterize in this way, the court notes two solidly proved items as sufficient. Probably the more important one was the carefully contrived introduction and promotion of the 110 system, already treated in considering the camera monopoly. The record is clear that the purposefully timed, long planned, and pointedly advertised combination of Kodacolor II and the 110 camera, along with appurtenant innovations, had the express purpose and clear effect of buttressing Kodak film sales. This program, commencing before the limitations period in this case, carried forward an earlier, evidently similar scheme involving the 126 system.

The remaining course of conduct to be noted here was the persistent and continued practice of CP&P to offer processing services only for Kodak films. While the CP&P monopoly in color film processing was ended by the consent decree of 1954, this Kodak organization was shown to remain the "prestige" photofinisher. The residual advantages of its extended past monopoly, its special access to the film monopolist's secrets, and its possession of the preeminent name in the industry place it at a strategic gateway affecting the acceptance and salability of any competitor's, or potential competitor's, amateur film. The network of retailers employing CP&P, and otherwise wedded to Kodak, were surely discouraged from stocking others' films when the esteemed and powerful CP&P organization would not handle it. The urge to compete by effective service and increased sales is so characteristic a pressure in American business that CP&P personnel requested the freedom to process non-Kodak film. Tests conducted by Kodak's Photographic Technology Division showed that non-Kodak film could be processed through the same solutions, with good results, and without adverse effects on the Kodak film. But

Kodak's management unswervingly rejected the pleas. And the record supports plaintiff's thesis that the purpose and effect were to impede the efforts of competitors in film manufacturing.

If, as the court holds, the evidence sustained the charge of anticompetitive actions affecting the film market, there remains defendant's interesting and difficult argument that plaintiff failed to show "causation" required to warrant any recovery for film overcharges. The argument is that before plaintiff could recover, it had to show not merely anticompetitive acts affecting the film market, but also "that such acts had such an impact on the prices of film as to cause Berkey to pay more, as a purchaser of film, than it would have paid but for the unlawful acts."[21] Or, as the point is reiterated in defendant's Reply Memorandum (p. 18), "the plaintiff must prove by facts a direct, proximate, causal connection between actionable conduct and the prices paid by it. . . ." As thus generally phrased, the position might seem to present no room for dispute. As elaborated, however, the argument is that the specific anticompetitive actions for which the defendant is found to be an unlawful monopolist must have their impact directly and proximately on price before a plaintiff may recover the difference between the defendant's monopoly price and a lower, competitive market price. It is this argument, acknowledged as weighty, that the court has rejected, both in charging the jury and in deciding the present motion. This is not to hold, of course, that an antitrust plaintiff in a case of this nature may recover without proof of "causation." It is to say, rather, that the requisite causation is shown when, as in this case, the price charged by a monopolist, found to have acquired or maintained unlawfully the

[21] Memorandum in Support of Motion 29.

monopoly making possible the charging of that price, exceeds a competitive market price.

Stated more fully, the rule on which the verdict rests in this respect is that where a defendant

> (i) has monopoly power in a relevant market,
>
> (ii) has acquired or maintained this power by anti-competitive conduct, and
>
> (iii) has employed its monopoly power to charge a price higher than what a competitive market price was or would have been,

a purchaser required to pay the monopoly price may recover the excess.

This follows, the court believes, from elementary principles of antitrust law in particular and tort law in general. It may help to explain this view if we refer for a minute to the more common and familiar situation of the price fixing conspiracy. Where two or more sellers combine to fix prices, it is the unlawful combination that gives them power over price. The results effected through the combination will determine the scope of their liability. If they fix a price below what competitors charge, say for standard predatory reasons, they may be liable to such competitors, but they will not, on that score, be liable to purchasers who pay that lower price.[22] If, in the more usual case, the price fixed is higher than a lawful, competitive price, customers may recover the difference.

But the conspiracy in that situation has accomplished what the monopolist achieves by himself, the setting of a price above that which would result from competitive

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[22] It is unnecessary here to conjure with possible later claims of such purchasers after the conspiracy succeeds in destroying competitors.

forces.[23] If the monopolist has acquired or maintained the power to do that by unlawful means, and is thus an illegal monopolist, his power to set a monopolist's price is exactly the same species of evil, and for at least as compelling reasons, as the unlawful power of conspirators to set *their* price. The power to fix prices is after all the gist of monopoly power. When that power is unlawfully obtained or employed, the monopolist pursues the same proximate goal for himself as the price-fixing conspirators aim to share together. It accords with settled tort principles to hold the wrongdoer for the intended and proximate consequences of his conduct.

That defendant succeeded in freeing itself from competitive restraints is explicit in the record of this case. The Chairman of the Executive Committee of defendants' Board of Directors, who also serves on the Finance and Operations

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[23] "[S]ince . . . [the decisions in *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911), and *American Tobacco Co.* v. *United States,* 221 U.S. 106 (1911)] it has been accepted law that not all contracts which in fact put an end to existing competition are unlawful. Starting, however, with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers; they are really partial monopolies." *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 427-28 (2d Cir. 1945).

Committee, and has in turn occupied the offices of Vice President of Marketing, Executive Vice President, and Chairman of the Board, testified very simply and candidly that Kodak determines its prices without regard to what possible competitors might or may be doing.[24] Now again, insisting that its actions with respect to film afford plaintiff no claim for relief, Kodak says it "only sold its own product, as it, like any other seller, is entitled to do at prices it determined unilaterally."[25] Without seizing upon a phrase, it may fairly be said that the law countenances determining prices "unilaterally" only for the small class of monopolists entitled to that exceptional freedom from the pressures of competition.

Concluding that a monopolist exacting prices above a competitive level is liable for the excess when the monopoly has been illegally acquired or maintained, the court put to the jury the question "whether Berkey has proved by a preponderance of the evidence that the prices it paid for film purchased from Kodak were higher than those Kodak would have charged in the absence of its monopolization of the amateur film market." (Tr. 18834). Similarly, the jury was told to decide whether defendant had used its mo-

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[24] "Q. In connection with Kodak product pricing during this period of time [Dec. 1958-Jan. 1963, when the witness was a Vice President of the company, sharing responsibility for direction of U.S. sales and advertising, Tr. 2022] was consideration given to the pricing of competitive products? "A. No. I don't really know what you're getting at. We didn't price, you know, with consideration of other products that were on the market. We priced from what we thought we could do the best and give us the greatest customer acceptance.

"Q. As far as you know, has that continued to be the general pricing policy of Kodak? "A. Yes, I believe so." (Tr. 5025).

[25] Reply Memorandum 20.

nopoly power "to insulate its products from price competition it would otherwise have had to meet, thus enabling itself to charge its customers unlawfully inflated prices for Kodak film." (Tr. 18835). The affirmative answers to these questions, and the award based thereon, are sustained in the court's view, by the record and the law.

COLOR PRINT PAPER OVERCHARGES

The jury awarded $8,803,000 for color print paper overcharges. The court is compelled to conclude that this award must be set aside in its entirety because the evidence upon further study is found to be insufficient to sustain either the finding of liability or the award of damages.

The finding that Kodak monopolized the market in color paper would seem to be amply supported so far as the element of market power is concerned. Defendant's share of this market ranged during the years in question from a high of 91% in 1969 down to a low of 60% in 1976. It also appeared that the disappearance of a substantial competitor, GAF, in 1977 foretold a reversal of the downward trend. While the rather steep decline in the period 1969-1976 may be some reflection of a market no longer monopolized, the 60% figure would remain sufficient to uphold the jury's vedict in this respect.

The fatal void in the evidentiary foundation is the required proof of exclusionary or anticompetitive conduct. Plaintiff has struggled with characteristic vigor and imagination to show that the necessary demonstration was made. But the court's restudy of the arguments and the evidence invoked to support them leads to the adverse conclusion stated at the outset. A single item of anticompetitive behavior seems sustainable, namely, the insistence by defendant that its backprint appear on paper sold to photofinishers. But this is insufficient, the court concludes, to

sustain the verdicts on liability and damages, or either of them. The several contentions, and the rulings upon them, are as follows:

(1) The claim of "systems selling" improperly employed, which has been held substantial in other connections, is asserted to apply here again. There are some documents in the record indicating a desire and interest entertained by defendant's sales and other personnel to merchandise "Kodak equipment, chemicals, and paper on a systems basis. . . ."[26] The difficulty for plaintiff is the absence of evidence that the objective was implemented in any fashion that could fairly be condemned as anticompetitive with respect to the color paper market. There is no authority—and this case is surely not meant to suggest—that "systems selling" is inevitably impermissible for a company with monopoly power. The problem, as indicated elsewhere in this memorandum, is to appraise the specific circumstances, including such matters as timing, purpose, and effects. The evidence concerning color paper shows nothing approaching an arguably wrongful implemention of the systems selling objective.

(2) Plaintiff assails as exclusionary defendant's practice of evolving color print papers effectively usable by photofinishers with defendant's own film but not attempting to test for or seek similar compatability with the film produced by other manufacturers. Accepting that this was defendant's practice, the court is upon reflection unable to discern in it anything wrongful or arguably exclusionary with respect to the color paper market. On plaintiff's thesis, Kodak was somehow obliged to fashion papers suitable for every-

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[26] The quotation is from a 1968 Advertising Program of the Consumer Markets Division. Similar language is found in a couple of documents extending into and after 1969.

body's film. But had defendant done that, it might well have found itself attacked for developing techniques and capacity, in the style condemned in *Alcoa,* for seizing every new opportunity and building necessary capacity to the detriment of its paper competitors. The analysis plaintiff proposes in this respect might conceivably have suggested adverse impacts on film rather than paper makers. Without pursuing that speculation, the court finds no rationally persuasive utility in this contention for the claim of a color paper monopoly.

(3) Berkey complains in this connection, as it does elsewhere, of defendant's insistence upon using the Kodak backprint on its color paper. The court has noted the plausible claim that this was improper *vis a vis* Berkey in its role as a photofinisher unhappy about advertising a competing photofinisher. But it has no perceptible force in the present context.

Berkey says the backprint "conditioned" consumers to want Kodak paper, thus forcing Berkey and others to buy it (at excessive prices). The evidence of such conditioning turns out finally to be thin to the point of nonexistence. Passing that, it tangles Berkey in contradictions. Until the submission of its prayer for equitable relief, see *infra,* plaintiff's claim has never been that it desired or demanded erasure of the backprint on *all* Kodak paper, only the elimination from paper purchased by Berkey. But if the conditioning argument were valid, that would have left Berkey clearly disadvantaged as against photofinishers accepting and using paper with the Kodak imprint. Furthermore, the argument is severely undercut by the evidence that during the years in question, Berkey's purchases of non-Kodak paper rose sharply; the percentage of its paper purchased from Kodak went from about 95% in 1972 to about 7% in

1977. The figures are drastically inconsistent with the assertion of a need for the Kodak mark.

The upshot is that the backprint practice remains condemned as unlawful leveraging of color paper market power into the photofinishing market. But this single item, relatively minuscule in the total picture, is held insufficient to sustain the finding of a section 2 violation in the color paper market.

(4) Plaintiff argues that Kodak pursued a policy of keeping competitors small, and that at least one purpose of this was to block competing paper manufacturers. The connective premise is that this "scheme had the purpose and effect of preventing a manufacturer of paper from establishing a relationship with a photofinisher which was large enough to provide an outlet for the sale of a sufficient volume of paper to enhance the manufacturer's ability to challenge Kodak's paper monopoly. . . ."[27] The trouble is that the evidence does not support the alleged "purpose" or "effect." There is no evidence that Kodak in fact entertained such a purpose. And there is no evidence that paper manufacturers had some special need of large photofinishers in order to challenge Kodak's supremacy.

(5) Plaintiff argues that it is unacceptably anticompetitive for Kodak, given its market share, to have its CP&P organization "purchase" only Kodak paper. This court finds, however, that there is no authority, and no sufficient basis in the principles of cases condemning exclusive dealing between separate entities, for holding that this single defendant was required to have its own division or department purchase from outside competitors. There is here a species of "foreclosure," to be sure. But it is a kind of in-

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[27] Memorandum in Opposition to Kodak's Motion 49.

ternal arrangement that seems thus far to be entirely allowable. The decision in *Int'l Tel. & Tel. Corp.* v. *Gen. Tel. & Elec. Corp.*, 1978 CCH Trade Cases ¶ 61,913 (D. Hawaii 2-28-78), cited by plaintiff on this point, involved a course of conspiratorial conduct among separate entities and a massive history of acquisitions, rendering it decisively distinguishable, if not wholly uninteresting, for present purposes.

(6) Finally, plaintiff complains that Kodak introduced a new three-step finishing process and a new paper to go with it in 1971, to the detriment of the companies whose five-step papers were not compatible with the new process. Again, however, the requisite qualities to show anticompetitiveness are absent. There is ample evidence that the new process was a desirable innovation, for ecological and perhaps other reasons. The paper and process went together as a matter of sound technology, not on perverse or deceptive explanations. Kodak had and has no monopoly either of chemicals or of processing techniques. The new paper was not linked to a new form of Kodak film; both the old and the new were equally serviceable for relevant existing film types. In short, there are no indicia here of significantly exclusionary aims or consequences.[28]

Without emphasing the point unduly, the marked decline in Kodak's color paper market share is surely not inconsistent with the conclusion that there was no anticompetitive conduct during the pertinent years and that competitors were indeed free to invade the market with substantial success. It is at least of passing interest to con-

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[28] Plaintiff stresses that CP&P stayed with a five-step process of its own for some period of time not shown distinctly in the record. This fact has been explained, however, on grounds that do not help plaintiff. The sinister implications Berkey would descry are not made visible by the evidence.

trast this development with Kodak's remarkably steady maintenance of a share hovering between 85 and 90% of the amateur film market. Kodak presumably had no burden in this private action of proving the *absence* of exclusionary conduct. But cf. *United States* v. *Grinnell Corp.*, 236 F. Supp. 244, 247-48 (D.R.I. 1966), and the specific reservation of the relevant question in the affirming opinion, 384 U.S. 563, 576n.7 (1966).[29] In any event, the record is found, after all, not to sustain this essential element of the color paper monopolization claim.

Furthermore, even if the conclusion were different as to liability, the verdict awarding damages for color paper overcharges could not stand. The only wrongful conduct shown by the relevant evidence had its impact upon the photofinishing market, not the market for color print paper. Thus, the requirement of causation is wholly unsatisfied. This may be contrasted with the verdict on film overcharges. There, too, a large part of the misuse of the film monopoly was in leveraging that impacted upon other markets. In addition, however, there was sufficient evidence of anticompetitive effect upon the film market itself to justify the award for resulting overcharges.

PHOTOFINISHING EQUIPMENT OVERCHARGES

Almost *de minimis* in the context of this case, but contested on grounds not frivolous, is the jury's award of $19,000 on Berkey's claim that it was required to pay excessive prices for six of Kodak's Dual Strand Film Processors purchased when these machines were alone in the field after the March 1972 introduction of the system com-

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[29] Plaintiff has preserved throughout the position, not accepted by this court, that a defendant shown to have monopoly power must shoulder the burden of justifying it as a condition "thrust upon" it in Judge Learned Hand's *Alcoa* phrase.

prised of the 110 camera, Kodacolor II film, new photofinishing chemistry, and this and related new machinery. Kodak challenges both the liability finding and the damage award.

As for liability, defendant argues there could be none because it was neither found nor claimed that Kodak monopolized [or attempted to monopolize] the photofinishing equipment market. It argues that a finding of unlawful leveraging in this setting could not stand. These contentions are the same, and are rejected for the same reasons, as those considered earlier on the photofinishing award.

Resisting the granting of damages in any event, Kodak points out that its Processor remained at the allegedly "excessive" price level even after other, less expensive machines emerged to compete with it, so that the failure to predisclose the new film and film format to other equipment manufacturers could not reasonably have been found to cause the claimed excess. Further, defendant cites the evidence that plaintiff bought an additional four Kodak Processors after other makers' machines, asserted to have been better and cheaper, were on the market, and argues that this overwhelms the charge that the Kodak product was sold at a price that can plausibly be denounced now as "excessive." Weighty though they may be, these arguments are not sufficient to defeat the jury's vedict.

There is no question that the Kodak Processor was alone in the market for several crucial months after March 1972. And the record shows what the jury was permitted to find was a striking relationship between this period of exclusivity and Kodak's earnings from operations on photofinishing equipment. Those earnings were at the rate of 4.6% in 1970 and 6.1% in 1971. In 1972, the year of the Processor's sole possession of the field, the rate leapt to 21.3%.

Then it fell to 3.2% in 1973, followed by losses at the respective rate of 3.6% and 23% in 1974 and 1975.

As for Berkey's purchase of four more Processors after competitive machines became available, this point was made to the jury and evidently rejected as grounds for denying damages. The jury was within its authority in so ruling. The evidence showed that these additional Kodak machines were bought only for Berkey plants already committed by prior purchases to use of the Dual Strand Processor and other Kodak 110 processing machinery. Whatever reasons of convenience, technology, or employee training might have warranted this continued commitment, the evidence in this respect does not destroy or eliminate the adequate record on which the jury made its $19,000 award.

That award will stand.

ROBINSON-PATMAN CLAIMS

The Robinson-Patman claims, though they involved for this case relatively modest amounts of money, presented some of the more perplexing questions both of law and of fact. Defendant's motion is on this aspect expectably imposing. It will be granted on the court's conclusion that the evidence was insufficient to establish damages.

This is not to say that the verdict on liability is so clearly sustainable as not to have given pause. The court has been troubled especially with questions as to the sufficiency of proof of (1) Kodak's knowledge that the lower prices were not cost-justified and (2) the substantial lessening of competition. In the end, if just barely, the finding of liability is found to be adequately supported.

On damages, however, defendant is entitled to prevail. This subject was given to the jury, if somewhat *dubitante,* on the following theory:

"*First,* that Kodak's prices were based directly on its

> costs, so that the lower flash costs lowered Kodak's selling prices. *Second,* that Berkey set its prices by pricing down from Kodak's prices on comparable products." (Tr. 18865).[30]

The theory was thought to be allowable under the authority of *Enterprise Industries, Inc.* v. *The Texas Co.,* 240 F.2d 457 (2d Cir.), cert. denied, 353 U.S. 965 (1957). Adhering to that position, the court finds the evidence insufficient to justify the jury's award, or, indeed, any award on this claim.

As to the first branch, the assertedly direct relationship between Kodak's costs and prices, a further review of the record reveals this evidence to have been exceedingly vague, general, and amorphous. Weighing heavily on the other side is the evidence that Kodak, far from pricing mechanically upward from its costs, actually charged the highest price it thought consumers would accept in quantities that would maximize profits; the relatively minor portion of kit prices represented by the flash unit; and defendant's evidence showing that the pattern of changes in its kit prices was unrelated to the pattern of changes in flash unit prices.

The second essential premise of the damage theory given to the jury is, if anything, still weaker on the evidence. Berkey presented no specific evidence tending to show that it actually did adjust its prices in the manner suggested in response to the supposed effects of the flash discounts on Kodak's prices. Indeed, the only evidence cited to support the claim that Berkey "priced down" from Kodak is *Defendant's* Exhibit 5360, an internal Berkey memorandum of March 6, 1975, which in the course of stressing Berkey's

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[30] Berkey duly excepted, and preserves its exception, to the court's refusal to instruct that the amount of the price difference should without more be taken as the measure of damages.

need to keep its prices low in order to compete successfully stated:

> "We cannot lose sight of this fact: we must be 20% below Kodak and/or Polaroid's dealer net price with comparable product, and we must be out with product as soon as possible after this introduction. This is not to say in certain cases we cannot be less than 20% but only that we should not build around that hope."

The vague, aspirational character of this statement of policy, which itself shows clearly the roughness of the relationship involved, embodied in a document issued several years after the alleged damages began to accrue, renders it far too slender a basis for the award of damages in suit. There being no credible proof of a profit squeeze suffered by Berkey, and thus no adequate proof of actual "loss to the plaintiff's business" attributable to Kodak's receipt of these discounts, *Enterprise Industries,* supra, 240 F.2d at 459-60; *Sun Cosmetic Shoppe* v. *Elizabeth Arden Sales Corp.,* 178 F.2d 150, 153 (2d Cir. 1949), the award of damages must be set aside.

II. Application for Equitable Relief

Plaintiff has applied for a broad array of equitable remedies, from divestiture through the publication of notice of the judgment. The subject has been thoroughly argued. The issues have been studied with care. For reasons hereinafter outlined, the court has concluded that all but two of the items of proposed equitable relief should be denied.

Divestiture

The most drastic form of equitable relief sought by plaintiff is an order of divestiture. Specifically, plaintiff asks

that Kodak be stripped of (1) its facilities for manufacturing cameras, projectors, photofinishing equipment, and "related items of equipment," (2) its facilities for the commercial processing and printing of film, and (3) such trademarks as "Kodak," "Kodacolor," and other, scarcely less powerful names.[31]

Whether divestiture may be ordered as a species of the "injunctive relief" authorized by section 16 of the Clayton Act, 15 U.S.C. § 26, is a vexed question. Even in a case of unlawful acquisitions, the Ninth Circuit has said no, *Int'l Tel. & Tel. Corp.* v. *Gen. Tel. & Elec. Corp.*, 518 F.2d 913, 920 *et seq.* (1975), and the Third Circuit, more favorably disposed, has indicated that it would require a strong case to make that remedy seem appropriate, *NBO Industries Treadway Cos.* v. *Brunswick Corp.*, 523 F.2d 262, 278-279 (1975), rev'd on other grounds *sub nom. Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). A thoughtful opinion by Judge Ward of this Court has also indicated that divestiture might be available to undo acquisitions in violation of Clayton Act § 7. *Fuchs Sugars & Syrups, Inc.* v. *Amstar Corporation*, 402 F. Supp. 636 (1975). There is a spread of other opinions on the subject. See *NBO Industries, supra*, 523 F.2d at 278 n.17.

In the instant case, however, the case against divestiture seems too clear to require a firm choice among the divergent precedents. Accepting, as the court does, all the pertinent

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[31] Defendant characterizes other prayers for injunctive relief—e.g., relating to patents and claims for technological disclosures—as seeking "divestiture." Doubting that the label fits, but finding it makes no difference in the end, the court treats these aspects elsewhere. Plaintiff does not treat under this rubric the proposal to require the dedication of the trademarks Kodak, Kodacolor, Ektacolor, Kodachrome, Ektachrome, Instamatic, and Pocket Instamatic, but the court finds it convenient to deal with this proposal here.

findings upon which the jury proceeded, this is not a case of unlawful acquisitions. The facilities plaintiff seeks to have stripped from Kodak are long established and integral parts of the organization unquestionably devoted in large measure for many years to constructive and lawful ends. The trademarks are likewise valuable, long-standing, and lawfully usable in diverse ways far transcending the boundaries of this particular lawsuit. The pertinent injuries to plaintiff, assuming they were not amply remedied by the award of substantial damages, and their recurrence not deterred by the effect of the award, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977), could not justify the devastating remedy of divestiture, which would, in all the circumstances, be punitive rather than appropriately curative. See *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 409 (1945).

CONCERNING CP&P

As an alternative to divestiture of CP&P, Berkey seeks requirements that Kodak disclose to photofinishers information that has heretofore been given first, or only, to CP&P, thus giving the latter temporary or permanent advantages over other photofinishers.

The prayer rests upon a verdict embodying findings, *inter alia*, that defendant has used its film monopoly unlawfully "to foreclose competition, to gain a competitive advantage, or to destroy a competitor" in the market for photofinishing services. Berkey's compensatory damages on this score were fixed at a relatively modest $55,700. Also part of the pertinent background is a 1954 consent decree in *United States* v. *Eastman Kodak Co.*, (W.D.N.Y., December 21, 1954), which, *inter alia*, barred Kodak from selling its color films on a basis that included processing charges in a single purchase price; barred resale price maintenance on

color films; required Kodak to license processors of color film to use its machinery and processes on reasonable terms; required the furnishing of technical literature and assistance to competing color film processors for a stated period of time; required Kodak to sell processing chemicals needed for color film processing not otherwise available; and required Kodak to make Ektachrome type film available in all formats in which it was then marketing Kodachrome film.

The evidence on this score showed, as the jury undoubtedly found (and the court concurrently finds), that CP&P was given advance notice of the introduction of Kodacolor II and other 110 films that permitted it to prepare itself with the necessary processes, machinery, and facilities so that it alone among photofinishers could commence processing 110 film from the date of its introduction; that CP&P received useful information concerning defects in, and variations among, the early emulsions of Kodacolor II which was withheld from independent photofinishers; that the 110 photofinishing equipment sold to independent photofinishers was injuriously inferior to that manufactured by Kodak for its own use; and that all of these acts and omissions were inspired by an intention to handicap independent photofinishers in their competition with Kodak. Other instances of use of Kodak monopoly power in color print paper and film which the jury might have found and deemed wrongful included the provision of inferior process control materials to independent photofinishers as compared with those developed for CP&P's use, refusal to supply formulae necessary for the employment of more economical bulk chemistry, rather than Kodak's kits, and the incomplete information provided by Kodak's technical sales representatives who simultaneously reported back to

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Kodak on the effectiveness of independent photofinishers.

All of these are items which reflect the use of Kodak's monopoly power in film or color print paper to handicap competitors and discourage competition in photofinishing. It is plain that Berkey has a very real stake in the future conduct of Kodak's film and paper operations which have been used in the past to give unfair and improper advantages over competitors to CP&P. The record supports the conclusion that Kodak will, unless enjoined, continue to engage in conduct of this sort. The problem is rooted in the structure of Kodak, where the film, paper, and processing operations are ultimately part of a single corporation. Believing divestiture to be uncalled for here, but convinced that a remedial scheme with lasting impact is needed, the court has given serious consideration to Berkey's proposals for elaborate disclosure requirements.

The details of Berkey's proposals reflect the complexities of relationships in an area of complex technology. They also lead to instant awareness of how troublesome it would be for Kodak to share its developmental secrets in this fashion with 600 or more photofinishers spread across the length and breadth of the land. A problem of balancing seems to emerge.

Having employed its spectrum of monopoly powers to keep photofinishers subservient, frequently uninformed of vital things known to CP&P, and subject to the disruptive shocks of sudden change followed by belated clues for adaptation, Kodak is properly called upon to remedy this course of conduct affecting Berkey and other photofinishers in the future. The demand is specially compelling in light of the 1954 decree, which appears to have been frustrated, at least in spirit, by Kodak's practice of favoring CP&P. If the remedy can be achieved, however, without undue injury to Kodak, that course should be pursued.

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The court concludes that the simplest and most readily manageable technique will be for Kodak to treat all photofinishers, including CP&P, alike in relevant respects. This will leave to Kodak power to disclose or not, but deprive it of the power to confer unfair and anticompetitive advantages upon CP&P. While it might seem superficially unrealistic, the record of this case contains persuasive evidence that Kodak is able, when this is desired, to maintain walls of secrecy between its various components. Accordingly, the decree will contain a requirement that defendant make no disclosures to CP&P concerning new or modified films, color print paper, processing chemistry, cameras, projectors, or photofinishing equipment without making identical disclosures to all other photofinishers with which it does business. Though this is simply stated here, the precise details of the decretal language, and any appropriate qualifiers, will, of course, be the subject of further consultations with counsel.

Kodak Apparatus Division Disclosures

As in the case of photofinishing, plaintiff's alternative to divestiture is a far-ranging program of compulsory disclosure of technological changes in other Kodak products affecting the product lines of the Kodak Apparatus Division, which produces, *inter alia*, cameras, projectors, and photofinishing equipment. Of particular importance among the varied and numerous other Kodak products whose introduction or alteration might affect such KAD products are Kodak's film and color print paper products. In addition to predisclosure requirements sought to be imposed affecting introduction of film and paper products, plaintiff seeks to bar introduction by KAD of new cameras and other product items which can be used with new or modified Kodak products from other divisions until eighteen months

have elapsed from the time of the film or color paper introduction, or until at least two of KAD's competitors have offered comparable equipment designed to take advantage of the new film or paper, whichever comes sooner. Finally, plaintiff seeks to impose on defendant the obligation to become a supplier of last resort of components needed to compete with KAD in manufacturing comparable products which are not otherwise available and which Kodak manufactures for KAD's use.

Here, in contrast with the circumstances pertaining to photofinishing, the enormous sweep of what Berkey proposes, measured against Berkey's minute and apparently disappearing stake in this matter, counsels a different kind of conclusion. The main concern in this area is with camera manufacturing, a function which it is represented, without dispute, Berkey is abandoning. It is also undisputed that Kodak's share of the relevant camera market has declined precipitously in recent years, although the exact amount of the decline in the last full year, 1977, is subject to some dispute. Our record also shows that most if not all of the camera manufacturers in the market defined by the jury, who would be the most direct beneficiaries of the proposed relief, are not within the United States. It is this foreign competition that has eroded Kodak's share of the camera market. It may be that Berkey's proposals would benefit the American consumer. It may be that they would not. The effects on American employment, and the economy generally, are still more problematical. The court need not adopt defendant's sometimes excessive appeals to patriotism in order to accept that interests far wider than our record and the court's competence are implicated at this point. See *United Shoe, supra,* 110 F. Supp. at 347-48. The case would stand differently if the public's Attorney General, chartered to speak for all the people, were here.

See *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954). And it is perhaps relevant that the court has been made aware of, and tangentially involved in, the Federal Government's separate pursuit of its interests in this situation. See *GAF Corporation* v. *Eastman Kodak Company*, 415 F. Supp. 129 (1976). Upon all the facts and circumstances the court concludes that the balance of the equities is against plaintiff with respect to the proposed requirements applicable to the Kodak Apparatus Division. These will not be ordered.

DEALINGS AFFECTING COMPLIMENTARY PRODUCTS

Among the seemingly clearest courses of exclusionary conduct on Kodak's part were its programs with Sylvania (in developing the magicube, from 1967 to 1970) and General Electric (in developing the flipflash, from 1969 to 1975). The most obvious vice in these arrangements was Kodak's successful pressure for secrecy, preventing other manufacturers from developing cameras suitable for the flash device until after joint disclosures by the respective flash manufacturers and Kodak. Attendant aspects of a dubious nature included Kodak's acquisition of patents and patent licenses from the flash manufacturers with the strongly arguable purpose and intended effect of exacting tribute from other camera manufacturers as the latter sought to make up for Kodak's head start with the magicube and the flipflash. The jury found, on ample evidence, that these arrangements unreasonably restrained trade, violating section 1 of the Sherman Act, and under the applicable instructions undoubtedly included this conduct in its findings of section 2 violations.

As part of the equitable relief, plaintiff seeks a broad set of prohibitions against dealings with any firm or person not a Kodak employee "relating to the design, development,

modification, advertising or marketing of any existing or proposed amateur camera, amateur film, color paper, processing equipment, any complementary product, component of any of the foregoing or materials, products or services for use in or cooperation with any of the foregoing," except when accompanied by arrangements of early and full disclosure to all actual and potential competitors, sharing of information with these others, an opportunity for participation by the others, royalty free licenses, and other conditions designed to assure that Kodak receives no special advantage from any joint enterprise.

Again, the proposed relief ranges light years beyond the occasion. It includes many things besides cameras, the center of plaintiff's relevant (but disappearing), concern in this case.[32]

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[32] This is but one of several reasons for overruling the proposed provisions effectively to nullify a list of patents held by Kodak embraced in a separate heading in the plaintiff's petition. One aspect of these provisions covers the patents arising out of the magicube and flipflash programs. Berkey's past ability to circumvent these patents undercuts any claim of future harm stemming from the no longer novel technology. The threat of an infringement action by Kodak against Berkey adverted to in Berkey's papers gives slight pause, but does not require relief now; in any future action Berkey is entitled to attempt to prove patent misuse by Kodak barring it from enforcement. The remaining portion of plaintiff's ambiguously framed proposal on patents would apparently bar Kodak from enforcing any patents it now owns or acquires in the next ten years on its major lines of products related to amateur photography. Patents were at most a minor part of the evidence that led the jury to find, and the court to affirm, that the flash programs were unreasonable restraints of trade and exclusionary conduct. There is no finding, and no warrant in our record for finding, a persistent course of patent abuse that would augur future harm to anyone, much less Berkey in its new situation. The proposed relief affecting assertion of patent rights will not be embodied in the final decree.

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There are infirmities in this prayer apart from its excessive breadth. While the violations in question seem at least as clear to the court as they did to the jury, there is no persuasive evidence that the verdict for damages, assuming it stands, will not serve as an adequate deterrent against repetition. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977). Berkey's own interest in the subject, minimal at best and apparently dwindling, is an exceedingly thin fulcrum on which to balance the world of "all" Kodak's competitors which Berkey would have us reach. There is here, as elsewhere in this aspect of the case, a public interest, perhaps fairly to be phrased as a "national interest," a concern never to be lost from view in considering questions of injunctive relief at the instance of a "private attorney general." See *Zenith Corp.* v. *Hazeltine, supra,* 395 U.S. at 131, 133; cf. *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329 (1944).

Balancing the several interests, public and private, the court discerns no sufficient basis for this species of injunctive relief in this case.

DISCLOSURE TO FILM AND PAPER MANUFACTURERS

The plaintiff proposes that Kodak be required to disclose information regarding new or modified Kodak film to color paper manufacturers, including the effects of the change on color paper and its processing, and modifications in the paper necessary to adjust to the film modifications. Such disclosure would have to be made in time to permit the paper manufacturers to respond to the changes prior to sale of the new film, would include all information given to Kodak's color paper division, and would be given by the time of disclosure to that division. Similar disclosure of information regarding new or modified color paper types would be required for competing film manufacturers.

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This prayer for relief is severely undermined by today's ruling, *supra,* that the finding of liability respecting color paper cannot stand. In addition, it is subject to several objections similar to those noted in earlier connections. Any injury threatened to Berkey is at best remote, for it does not compete with Kodak in the manufacture of either film or color print paper. Nor does Berkey purchase film, except for purposes of resale, so that collateral effects of color paper modifications on film makers have at most a remote impact on it. The recent sharp decline in Kodak's share of the color print paper market also serves to reduce the impact of any Kodak product modifications in this area. To be sure, as a user of color print paper in its photofinishing operation, Berkey has some interest in film modifications affecting color print paper. Even so the effect on Berkey is at most secondary.

More critically perhaps, the verdict does not reflect any finding of injury to Berkey as a result of privileged information exchanges between Kodak's film and paper manufacturing divisions. The record could not support a finding of such injury to Berkey or to anyone else. There is no evidence to support Berkey's claim that paper and film were part of a wrongful system introduction, or any system introduction whatsoever. Thus, there is no showing of wrongful conduct in this regard in the past, and no showing of threatened injury to Berkey in this respect in the future.

The limited circumstances in which introduction of physically interdependent products may be deemed wrongful, stressed in connection with the motion for judgment notwithstanding the verdict, must be recalled here. Absent monopoly power and circumstances demonstrating that the physical interdependence was a tool for exclusion rather than a consequence of design for meritorious performance, there is nothing wrongful about introducing interdependent

paper and film should this occur in the future. While the decree need not be limited to violations shown to have occurred in the past, it must not enjoin all possible breaches of law. *Hartford-Empire Co.* v. *United States,* 323 U.S. 386, 409-10 (1945). It follows *a fortiori* that there is no need and no grounds to enjoin so broadly conduct which in many or most circumstances would be wholly innocent.

Insofar as wrongful injury may be threatened to Berkey as a photofinisher by reason of film innovations affecting it as a consumer of color paper, it will be adequately protected by the provisions assuring it of treatment comparable to that received by CP&P.

Accordingly, the relief sought under the present heading will not be granted.

PROHIBITIONS AGAINST REFUSALS TO DEAL AND RELATED PRACTICES

Berkey seeks an assortment of injunctive provisions affecting the terms on which Kodak sells its film, color paper, and processing services, and on which it supplies color print paper for use by CP&P. These provisions would require Kodak to:

> (1) make each variety of film available for sale in any length, width, format and form of trade dress or identifying labeling and packing requested by any customer, at a reasonable price as defined by its prices and profits on other film sales;
>
> (2) discontinue selling and using color print paper bearing any insignia identifying Kodak as its manufacturer;
>
> (3) accept for processing non-Kodak film, and slides and negatives made from non-Kodak film, at a

reasonable price as defined by its prices on the processing of Kodak film; and

(4) abolish its policy restricting CP&P to use of Kodak manufactured color paper, equipment, chemicals, and other supplies, and require CP&P to purchase at least 40% of its requirements of such products from non-Kodak vendors whenever products "substantially comparable" in quality to Kodak's are available at prices lower than Kodak's.

The relief sought extends well beyond the wrongs affecting Berkey proved to the satisfaction of the jury or the court and therefore is to be denied in major part. The proposed provisions relating to the availability of film respond to wrongs which, if established, affected Berkey only indirectly. As for the necessary showing of future injury by threatened repetition of these wrongs, the case is even weaker. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 130 (1969). The restrictions on film availability, if wrongful, were only found to be so on the basis of particular facts and circumstances which added up to an overall pattern of willful maintenance of monopoly power. This is most clear as to the restriction of availability of Kodacolor II to the 110 format immediately upon its introduction. While injunctive relief need not be limited to the precise acts found illegal, *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* 395 U.S. at 132; *Hartford-Empire Co.* v. *United States,* 323 U.S. 386, 409 (1945), the scope of past wrongs informs the court in its exercise of discretion as to injunctive relief for the future. It is pertinent, therefore, that the conduct Berkey wishes to have broadly enjoined occurred only in a specific setting unlikely to recur after the judgment herein. The court also notes that the relief sought would mainly benefit others than

Berkey, a consideration of recurrent importance in this private action.

Similar thoughts apply in large part to the proposed ban on the placement of a Kodak backprint on its color print paper. The primary beneficiary of such relief would be Kodak's paper competitors. On the other hand, the evidence sustains a finding that Kodak, in its unique role as both paper manufacturer and photofinishing competitor, gained an unfair advantage over the photofinishers by virtue of its monopoly power, in that Kodak paper was only available with the backprint to independent photofinishers. In the setting of Kodak's monopoly power in color paper this was, or could be found to be, a device to force Kodak's photofinishing rivals to advertise their competition.[33] The undisputed fact that Kodak provides neutral paper to Polaroid, presumably responding to similar concerns when expressed by a more powerful bargaining partner, shows that no undue hardship would be imposed on Kodak by requiring it to sell its color paper with or without the backprint at the option of the purchaser. Although Berkey no longer purchases the bulk of its paper from Kodak, the absolute volume of its purchases is large, and the photofinishing operation continues to be the backbone of Berkey's business. The harm threatened to Berkey for the future is clear. The evidence reflects no hardship for Kodak in omitting the backprint. Therefore, the decree to be entered will require Kodak to sell color print paper without the backprint at the option of the purchaser.

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[33] The court's conclusion, *supra*, that the use of the backprint to injure photofinishers is insufficient to support the verdict of liability for monopolization of color print paper does not bar the award of equitable relief. The record amply supports a finding that future harm to Berkey by this wrongful use of Kodak's monopoly power in color print paper is threatened.

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The proposed requirement that Kodak process the film of all manufacturers is on even weaker ground than the film availability proposal. Not only is the posited effect of Kodak's exclusive policy on Berkey remote, and possibly incredible, resting on the hypothesis that (1) this policy cripples film competitors despite Kodak's low market share and relatively high processing charges, and that (2) this in turn hurts Berkey, which might process some share of an enhanced market of non-Kodak film. The theory is also somewhat paradoxical. The evidence shows that Berkey has been a leading processor of non-Kodak films and thus might be hurt by such a provision. It might be sufficient in the end to say that Kodak's exclusive processing policy was a modest aspect of the wrongful conduct which the jury might have found and that its prevention by injunction is not justified.

More basic problems infect the proposal that CP&P be freed to purchase non-Kodak supplies and mandated to do so where appropriate supplies are available below Kodak's price. In the one area where the jury might have found Kodak at fault in this respect, the purchase of color paper, the verdict is being set aside. In any event, Berkey is not a manufacturer of any of these supplies and cannot claim injury in that capacity.

PROHIBITIONS AFFECTING SYSTEMS SELLING

The subject of photographic systems broadly defined was the one most extensively addressed by the evidence. It was plaintiff's contention, clearly and appropriately accepted by the jury, that certain uses of photographic systems by Kodak represented anticompetitive methods by which the defendant enlarged, maintained, and expanded into allied fields its several monopoly positions. The most important

and extensive matter under this heading was the coordinated development in secret, and public presentation in March 1972, of Kodak's initial line of 110 cameras, Kodacolor II film in the 110 format, new photofinishing equipment, and a new photofinishing process. The jury evidently found the effects of this included giving Kodak temporary absolute monopolies in several markets, rendering competitors' inventories obsolete, and otherwise handicapping competition in the affected markets. Another, less sweeping and devastating development of the same nature was the simultaneous introduction of the XL movie cameras, Ektachrome 40 and 160 movie film types, and Ektachrome Autoprocessor in August 1971. The jury could have found this to have been exclusionary conduct in the film market, although for any one of several possible reasons it found Kodak not liable for attempted monopolization of the movie camera market.

As noted above, the jury's verdict reflects a determination that the 110 system was a deliberate, anticompetitive mode of economic warfare rather than unobjectionable competition on the merits. The same finding could have been made as to the XL system. The court has concluded that this aspect of Kodak's conduct lends powerful support to key aspects of the verdict.

Claiming that the remedy must be more than money damages, plaintiff now asks for a variety of forms of injunctive relief intended to prevent Kodak from reaping anticompetitive benefits from photographic systems. Major aspects of these prayers, including divestiture and predisclosure, have been treated earlier. Under the present heading the plaintiff asks for provisions governing the merchandising (as distinguished from introduction) of photographic systems.

Plaintiff now asks that Kodak be required to assign separate personnel and separate advertising agencies to each

of the following products or lines of products:

1. Conventional still cameras
2. Instant cameras
3. Movie cameras
4. Slide and movie projectors
5. Amateur conventional film
6. Instant film
7. Color print and processing services
8. Photographic paper
9. Any other product or group of products sold by defendant.

Further, plaintiff would have Kodak enjoined from packaging, advertising, or promoting more than one product at a time in any fashion, and would require Kodak to announce, in advertisements and elsewhere, that it is in no respect necessary or advantageous to use complementary Kodak products rather than a competitor's in conjunction with a particular Kodak product (as: film with cameras, film with processing services, film with color paper, cameras with film). Finally, Kodak would be required to use its best efforts to prevent any person other than a retailer from using or recognizably depicting Kodak's name, trademarks, other trade names, identifying insignias, or products in any way in advertising, promotional material, or any other manner.

Again, the prayer for relief outruns the proof and the needs of the plaintiff. As reflected in the charge to the jury at the conclusion of the liability trial, the advertising and promotion of products in the form of systems was a minor element in the case. It could at most be corroborative of

the exclusionary nature of the introduction of new product systems, and could not represent a discretely cognizable form of wrongful conduct in and of itself. There was no occasion to find, the jury did not find, and the court would not be prepared to find that the merchandising of photographic systems must be deemed wrongful, always or everywhere. Nor is there in the present record sufficient basis to conclude that wrongful instances of "systems selling" are "likely to continue or recur." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969).

What the verdict may be fairly held to establish is that the sudden explosion of new "systems," where Kodak has monopoly power in several interrelated markets, where the evident purpose is not a boon to consumers but a blow to competitors, and where other indicia of monopolistic intent are present, might well be found another time to be evidence of a violation of section 2 of the Sherman Act. If such things come to pass, merchandising appeals for such wrongfully introduced systems may conceivably play an exclusionary role. But the prospective relief plaintiff seeks would forbid all kinds of conduct outside the dimensions, or even the broadest penumbra, of what was proved or foretold on this case. No justification is shown either for the sweeping proposal plaintiff makes on this subject or for any lesser version.

ROBINSON-PATMAN ACT PROVISIONS

Having found the verdicts on liability to be barely sufficient to withstand Kodak's motion to set them aside, and having set aside the awards of damages under this heading, the court denies the injunctive relief for which plaintiff moves. The prayer is for a sweeping prohibition against future violations of section 2(f) in all spheres of Kodak's operations and against Kodak's purchasing on terms not

stated in generally available price lists maintained by its suppliers. Nothing in the record shows any threat of harm to Berkey through repetition of the practices demonstrated at trial. Even on a stronger record, it would be highly questionable to order wholesale compliance with "the law" embedded in the uncertainties of Robinson-Patman. See *Hartford-Empire Co.* v. *United States,* 323 U.S. 386, 410 (1945). The requested relief on this score will be denied.

RESIDUAL CATEGORIES

The proposed decree embodies a variety of other items, such as a requirement that Kodak afford functional discounts to wholesalers and original equipment manufacturers as well as quanity discounts; a prohibition against market allocation, including allocation among different Kodak companies; and a long list of orders enjoining such things as full-line forcing and minimum quantity requirements for Kodak dealers, cross-subsidization among different Kodak operations and sales below costs, restrictive covenants in employee contracts, and all manner of acquisitions of technology, patents, trademarks, assets, or other business interests. Plaintiff's arguments supporting these various forms of relief have been considered in detail. Most of the items sought are related to conduct about which there is no evidence in the record. Others, if adverted to in passing, were never considered by the jury as bases for finding wrongful maintenance of monopoly or any other illegality. Without pursuing them in further detail, these sundry items are denied.

To summarize on the two motions before the court:

I. Defendant's motion for judgment notwithstanding the

verdict is granted to the extent that (A) the award of $1,417,330 on the claim respecting magicube cameras for the year 1971 is set aside; (B) the award of $8,803,000 on the claim for overcharges on color print paper is set aside; and (C) the awards of $200,000 and $45,100 for violations of section 2(f) of the Robinson-Patman Act are set aside; and is otherwise denied.

II. Plaintiff's prayer for equitable relief is granted in the two enumerated particulars, and is otherwise denied.

These rulings will be embodied in a final judgment to be prepared in consultations between counsel and the court.

Dated, New York, New York
June 16, 1978

MARVIN E. FRANKEL
U.S.D.J.

APPENDIX D

Opinion of the District Court (dated August 8, 1978)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BERKEY PHOTO, INC., *Plaintiff*, —*against*— EASTMAN KODAK COMPANY, *Defendant*.	73 Civ. 424 (MEF)

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FRANKEL, D. J.

Defendant moves variously for a new trial, to amend the judgment, and for reargument of its motion for judgment

notwithstanding the verdict. Some of the contentions made in this fashion are merely stated, not argued in any substantial sense, and may be left for full airing elsewhere. The questions that seem to merit treatment here, and their resolution, are as follows.

I.

Perhaps the headiest of the subjects now presented, for the first time in this long litigation, is a cluster of constitutional issues as to Section 2 of the Sherman Act and Section 4 of the Clayton Act, on their face to some degree but more particularly as applied in this case.

In its broadest form, defendant's attack on § 2 of the Sherman Act as void for vagueness on its face would rewrite nearly a century of history, solid precedent, and scholarship. The refutation of this most sweeping position is amply outlined in plaintiff's opposing papers. The court sees no benefit in tarrying over the principles and authorities that seem so decisively opposed to defendant's views.

Approaching the narrower, more pointed effort to show that § 2 must be held void for vagueness in its application to this private action, defendant says that it "does not here challenge the application of the antitrust laws in cases like *Alcoa*[1] *or United Shoe,*[2] nor * * * contend that the results reached there were necessarily unconstitutional."[3] Those were decisions by judges, defendant argues, and involved merely equitable relief, not huge damage claims. It is one thing the argument runs, to have *judges* manipulate con-

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[1] *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945).

[2] *United States* v. *United Shoe Machinery Co.,* 110 F. Supp. 295 (D. Mass. 1953), aff'd *per curiam,* 347 U.S. 521 (1954).

[3] Memorandum Concerning Constitutional Issues 5.

cepts like "honestly industrial," "exclusionary," and "anti-competitive," for purposes of decreeing future changes in the lives of large corporations. It is something quite different to unleash a *jury* under such concepts to consider large money claims "that *retrospectively* punish conduct newly found to violate the law."[4]

In light of defendant's steady insistence upon the limited capacities and understanding of lay jurors, it is fair to recall again at this final stage that the preference for a jury was defendant's, not plaintiff's. As for the notion of "retrospectivity," however close defendant now comes to accepting *Alcoa* and *United Shoe* as not "necessarily unconstitutional," both were clearly more striking glosses on existing law than anything decided in this case. Yet even as to *Alcoa,* and its *in haec verba* endorsement by the Supreme Court in *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946), the claim that a fundamental alteration in the law of monopolization was effected has been squarely rejected. See *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 495-502 (1968). In the latter decision, rejecting the contention that damages could be awarded only from the date of *American Tobacco,* the Court stressed the basic historical continuity in the interpretation of the Sherman Act, stretching back to 1912, and found ancient precedent for the rule that the conduct element of the monopolization offense does not require proof of conduct not honestly industrial. *Id.* at 496. The Court concluded that there had been no "sharp break" with the line of earlier authority, and that there were no prior decisions justifying potential antitrust defendants'

> "thinking that then current antitrust doctrines permitted them to do all acts conducive to the creation

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[4] *Id.* at 6 (emphasis in original).

> or maintenance of a monopoly so long as they avoided direct exclusion of competitors or other predatory acts." (Footnote omitted.)

Id. at 499.[5]

The Court therefore found it unnecessary to consider whether criminal due process doctrines, such as those relied upon by the present defendant, barred an award of damages for years prior to 1946, there being no

> "clearly declared judicial doctrine on which * * * [the defendant] relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful."

Id. at 496. Similarly we need not consider whether the present case denied defendant due process, for no radical or even significant transmutation of the law was worked herein.

The court's instructions to the jury in the instant case reflect a direct application of the principles of *Alcoa* and *United Shoe*. The novelty of this application, which the defendant protests so vigorously, lies only in the set of facts to which these principles are applied. As defendant itself argues, antitrust offenses are at root an outgrowth of the law of torts. It is a fundamental tenet of tort law that the application of settled general rules to novel or unique fact situations by a trier of fact does not create any constitutional infirmity. Triers of fact, including most commonly juries, routinely determine civil liabilities by

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[5] The dominant thread of continuity described by the Court is but one of several sufficient reasons for rejecting Kodak's argument that prior decisions affirming the constitutionality of the Sherman Act are not controlling here. The court rejects this argument as totally unfounded.

deciding whether a general standard—such as reasonable care—was observed or breached by a particular course of conduct. No one would seriously tender the argument that a tort judgment was infirm because no precedent gave warning that the particular factual pattern would be deemed grounds for liability.

Defendant's constitutional thesis about what "lay jurors or business people" must be deemed incapable of understanding would draw into desperate question a large portion of the grave business to which jurors attend daily in our system. The complaints as defendant makes them, about the lack of "objective or explicit standards,"[6] about the jury's being commissioned "to consider and weigh in an undefined manner" an array of evidentiary factors,[7] about the "subjective" form in which terms like "exclusionary" and "anticompetitive" were used—[8] such complaints, if accepted, would have meant a jury trial of a case like this one was doomed from its inception for fatal vagueness. It would also mean that much else that juries do is unacceptable—like compendious findings on a host of evidentiary factors, often with the gravest consequences, as to whether there has been proof of states like "malice," "willfulness," or "negligence," "recklessness," "wantonness," and "good faith."

The modest extrapolation of the settled principles of *Alcoa* and *United Shoe* to new facts could not have astonished defendant's legal advisors. Our record reveals that Kodak's counsel warned of potential liability for practices involving gratuitous use of photographic systems. Such practices in fact constitute the central core of the conduct

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[6] Memorandum Concerning Constitutional Issues 11.

[7] *Id.*

[8] *Id.* at 12.

supporting the monopolization verdicts in this case. More generally, Kodak had plenty of experience and advice from which to imagine, more than vaguely, that its powers as a monopolist, previously questioned in court by both the Government and private parties, should be used with care and consideration.

Kodak invokes Mr. Justice Frankfurter's observation, in dissent, that "[t]he vagueness of the Sherman Law was saved by imparting to it the gloss of history." *F.T.C.* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 405 (1953). History did not stop in 1912. The years since then are marked by a familiar process of gradually shifting interpretation of the Sherman Act, without any radical breaks, as the Court observed in *Hanover Shoe, supra.* As frequently happens, defendant cheerfully accepts old cases that made new law, but urges strenuously that the course of organic growth had to stop before this case.[9]

The general suggestion of differences between cases in equity—where divestiture, deep changes like bans on leasing machinery, and other drastic measures may be taken—and damage suits is scarcely compelling on the question of what may be void for vagueness. Not only is the point unpersuasive as an original abstraction; it is actually premised upon an inaccurate supposition that there is a

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[9] Kodak pursues its course of misconception in observing that *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, 567 F.2d 791 (7th Cir. 1978), petition for cert. filed, 46 U.S.L.W., 3695 (May 1, 1978), and *Greyhound Computer Corp.* v. *International Business Machinery Corp.*, 559 F.2d 488 (9th Cir. 1977), cert. denied, 46 U.S.L.W., 3453 (Jan. 16, 1978), relied upon by this court to corroborate its interpretation of the seminal *Alcoa* and *United Shoe* precedents, were decided after the introduction of the 110 camera. None of these cases purported to depart from settled precedent; had they done so the defendants therein could presumably have raised the argument made here by Kodak.

sharp dichotomy between suits in equity and damage claims. As plaintiff reminds us, *United Shoe,* pressed by defendant as a major example of the gentler equity sanctions, served in fact as predicate for private damage awards. *Hanover Shoe* v. *United Shoe Machinery Corp.,* 245 F. Supp. 258 (M.D.Pa. 1965), vacated in part on other grounds, 392 U.S. 481 (1968). And that is, of course, a standard course of events, explicitly charted by statute, 15 U.S.C. § 16 (1976).

Further elaborating the claim that it met an unforeseeable fate under a vague statute unpredictably applied in this case, Kodak urges that the standards under which the jury decided were insufficiently "objective." In fact, Kodak says, the jury proceeded without "any ascertainable standard***."[10] The court, it is claimed, acted "legislatively and defined a new violation of Section 2"[11] leading to a verdict which must be condemned as "subjective determination" and a "legislative act."[12] The settled terms of familiar antitrust precedents cannot be constitutionally administered in a jury trial, defendant argues, because they are unintelligible to those they govern. "Whatever meaning words and phrases like 'anticompetitive,' 'exclusionary,' 'honestly industrial' and 'thrust upon' might have to judges and specialists in arcane antitrust law, they could have no comprehensible meaning to lay jurors or business people."[13]

As is recurrently true in the motion papers now before the court, these contentions include some remarkable post-verdict novelties. Repeatedly in its own requests to charge Kodak employed words—"anticompetitive," "exclusionary,"

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[10] Memorandum Concerning Constitutional Issues 10.

[11] *Id.* at 13.

[12] *Id.* at 14, 16.

[13] *Id.* at 19.

"substantial," "isolated," "significant," "trivial"—that it now assures us are too imprecise to achieve a constitutional minimum of guidance for jurors. The revealing significance of such an altered stance, even apart from the technical waiver of the new arguments, is clear without extended comment.

In any event, if it were permissible at this late juncture, the claim of vagueness of the offense as applied in this case would have to be evaluated in the setting of the charge as a whole, not by conjuring with a handful of words, stripped of the context intended to give them meaning. Some 24 legal-size pages were devoted to the explication and definition of exclusionary conduct in the court's charge to the jury. The merits or errors to be found in the full charge, along with the contributions or non-contributions to the final product by the parties in the long hours of consultation and study by court and counsel, will ultimately have to be decided by a higher tribunal. It is pertinent, however, to protest that the court defined the applicable legal standards as precisely, objectively, and intelligibly as it could. When asked for suggestions to tighten any remaining ambiguities, defense counsel was only able to suggest language wholly withdrawing the central factual questions from the jury, by instructing that introduction of new products and the failure to predisclose them could under no circumstances be found to be wrongful conduct. The court's reasons for rejecting these proffered rules of *per se* nonliability are set out in the Memorandum on Post-Trial Motions and need not be repeated here. Viewed in this light, however, it becomes clear that the true gravamen of defendant's argument is not the assertedly vague definition of the offense, but the court's interpretation of § 2 of the Sherman Act in light of the major precedents.

In any event, defendant's submission that it has been

entrapped by a vague statute into an astonishing judgment nobody could have predicted presents a remarkably truncated and inaccurate view of the proceedings. Defendant argues its constitutional position much of the time as if the verdict rested on the simple and fantastic proposition that a manufacturer must disclose in advance new products or product systems. If that were the case, one would be hard put to know how or why defendant spent more months than plaintiff putting on its evidence to avoid liability. Actually, of course, there never was or could have been any such finding. At other times, ricocheting to another unreal extreme, defendant complains that it was condemned for its mere "status" as a monopolist, finding it possible in that context to cite as relevant authority the protection from such a fate given for a narcotics addict in *Robinson* v. *California,* 370 U.S. 660 (1962). But, of course, this case, and settled law, involves neither "status" nor conduct *alone.* What the jury was permitted to consider was a claim that the proof showed (1) an awesome degree of monopoly power, (2) an array of arguably anticompetitive actions in the exertion or maintenance of that power, and (3) resulting injury to plaintiff. The question of predisclosure, albeit a prominent subject, was only one of a number of matters to be considered in deciding the second element. It is thus neither accurate nor useful to insist starkly that the case stands for some vague, general requirement of predisclosure. It is as if *United Shoe* were read to outlaw long-terms [sic] leases of machinery, *Alcoa* to forbid systematic expansion of productive capacity, or *United States* v. *Griffith,* 334 U.S. 100 (1948), to condemn bargaining for first-run movie exhibition rights.

Another barrage of new constitutional ideas following the verdict is aimed at the award of treble damages. As will appear below, many of these contentions, if they had

merit, would be foreclosed because all of them, including those that do not flatly reverse prior positions, should have been offered as requests to charge the jury.

Defendant's broad submission is that the statutory authorization of treble damages in § 4 of the Clayton Act offends against at least three protections of the Bill of Rights (in the Fifth, Sixth, and Eighth Amendments). The argument begins with the proposition, quoting a phrase from an 1890 debate, that the provision is "purely penal and punitive.'"[14] Even on the level of labels, if they were decisive, defendant would not get very far with this point. The cases, including several quoted by defendant, are agreed that § 4 is not "penal" in any sense useful to defendant. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977); cf. *City of Atlanta* v. *Chattanooga Foundry & Pipeworks,* 127 F. 23, 28-29 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906); *Leonia Amusement Corp.* v. *Loew's Inc.,* 117 F. Supp. 747, 756 (S.D.N.Y. 1953); *Winkler-Koch Engineering Corp.* v. *Universal Oil Products Co.,* 100 F. Supp. 15, 29 (S.D.N.Y. 1951). The fact that some authorities also indicate that the trebling of damages serves a punitive funtion in addition to its compensatory, deterrence, and remedial functions, does not vindicate defendant's constitutional thesis. The idea of punitive damages, and, specifically, treble damages, in civil cases, to be assessed by the court, not the jury, is no novelty. See *Seymour* v. *McCormick,* 57 U.S. (16 How.) 479, 487-88 (1853). Nor is the principle affected by the large size of the verdict in this case against a self-described "giant." It is worth not-

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[14] From a speech of Senator Hoar, 21 Cong. Rec. 3147 (1890), reprinted in 1 E. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 283 (1978). The remarks of Senator Regan, following those of Senator Hoar, stressed the compensatory and non-criminal nature of treble damages. *Id.*

ing in this connection that our record reflects the difficulty confronting a plaintiff seeking to prove actual damages in a monopolization case. The task, as plaintiff's counsel aptly described it, is to attempt the reconstruction of "a world that never was." In some instances the court was required to disapprove all plaintiff's proposals for measuring particular categories of damages, despite the fact that no alternative was presented by the defendant and despite the probability that some injury, however uncertain in amount, had been inflicted upon the plaintiff. Thus the trebling of damages is compensatory in the special sense that it tends to ensure, albeit in a rough fashion, that wrongs do not go unredressed because of the inherent difficulty or impossibility of proving all items of damages.

We turn to a series of arguments based upon constitutional theories which the court will dismiss on the grounds, *inter alia,* that they contradict positions taken before the charge and verdict or inject novel views of the law that the court was never given timely opportunity to consider for inclusion in the jury's instructions. Taking these in order, the first is not the least astonishing: the court was required to charge, Kodak says, that the jury must find specific intent to monopolize, like the *mens rea* required in most criminal offenses. Not only was this never suggested earlier; even as late as its motion for judgment notwithstanding the verdict, Kodak was complaining that the court had erred in allowing the jury to consider intent in any way at all on the charge of monopolization. See the court's Memorandum on Post-Trial Motions of June 16, 1978, pp. 16-19. Changes of position so late and breathtaking are an imposition upon the court and opposing counsel.

Defendant's contention is in any event devoid of merit. The opinion in *United States* v. *United States Gypsum Co.,* 46 U.S.L.W. 4937, 4941, 4941 [sic] n. 13 (June 29, 1978), which held that *mens rea* was an element of the criminal offense under § 1 of the Sherman Act, as a matter of common law doctrine concerning criminal offenses but not as a

matter of constitutional law, expressly noted that no such requirement applies to civil antitrust offenses.

Similar to the new thought about *mens rea* are defendant's complaint that plaintiff was not required to prove its case beyond a reasonable doubt, that Kodak was entitled to a presumption of innocence, and that Kodak was entitled to indictment by grand jury as a prerequisite to trial on the claims in this action. Defendant never raised any of these exotic thoughts before. They are not tendered, however, as complaints about the instructions actually given, but to implement the thesis that the judgment in this case imposes what amount to criminal sanctions. They are not significant additions to the basic point, which has been considered earlier.

Finally, defendant now opines that the Seventh Amendment required the jury, not the court, to assess treble damages if they were allowable at all. Kodak took the preverdict position everyone else had taken until now—that the question was for the court, not the jury. This is undisputedly the law, and reflects a clear congressional intent that trebling of damages be automatic. *Noble* v. *McClatchy Newspapers,* 533 F.2d 1081, 1091 (9th Cir. 1975), vacated on other grounds, 433 U.S. 904 (1977); cf. *Lehrman* v. *Gulf Oil Corp.,* 500 F.2d 659, 667 (5th Cir. 1974), cert. denied, 420 U.S. 929 (1975); *Herald Co.* v. *Harper,* 293 F. Supp. 1101 (E.D. Mo. 1968), aff'd, 410 F.2d 125 (8th Cir. 1969).

II.

Defendant's arguments on liability and the amounts of the several damage awards retrace for the most part terrain that has been traversed repeatedly at several stages of this lengthy case, both before and after the verdicts. Many of the arguments were recognized throughout to be substantial, and their force has not diminished in the proc-

ess of further refinement and rethinking. Some of the arguments now made are novel, were not presented (or certainly not presented in their present shape) at earlier stages, and may come too late for this reason. In any event, having studied each contention, the court finds no sufficient reason either for granting a new trial or for modifying the judgment. Nor does it seem useful to add to the *nisi prius* literature with repetitions or elaborations of views heretofore recorded.

It should be acknowledged, however, that at least two of the contentions now made with special cogency have given the court special pause: (1) the argument against film damages prior to the 110 camera introduction, and (2) the argument for reduction of film damages on grounds of non-comparability of other manufacturers' film. It is a close question indeed whether the relevant evidence of anticompetitive conduct within the limitations period preceding March 1972 supports the award for that period. And the evidence of comparability in two or three categories is scarcely imposing. Nevertheless, having tarried at some length over these problems, the court arrives in the end at a reaffirmation of the judgment as it was entered.

Without responding here in any detail to the characteristically full memoranda of the parties, the court recalls one or two basic thoughts. First, there was enough evidence of conduct the jury could have found anticompetitive carrying over from before 1969 into and through the period in suit. While conduct preceding 1969 could not be, and was not, allowed as grounds for liability in itself, its continuation was available and presented to the jury with respect to the succeeding times open for judgment. A second, related point is the court's premise, contrary to defendant's, that the heart of the offense denounced in Sherman § 2 is the monopoly power enabling its possessor to block com-

petition and exact an excessive, monopolist's price. On this premise, while proof of anticompetitive conduct in acquiring or maintaining the power has been held by the court (contrary to plaintiff's view) to be essential to complete proof of the offense, plaintiff is not required to show either that this conduct in itself accounts for the excessive price or was in itself the *sine qua non* to continuation of the monopoly power during a particular period under scrutiny. If this premise is wrong, the verdict may well be infirm. Having reconsidered it once again, however, the court adheres to it.

The court has similarly revisited doubts concerning the extent of the jury's award on film, particularly on the issue briefed effectively by defendant concerning comparability *vel non* of other makers' films as the basis for computing the excessiveness of defendant's price. Again, however, the court finds the evidence sufficient in the last analysis to sustain the jury's award. Where a monopolist, like Kodak in this case, comes close to having the whole national market, the proof of comparability is a large challenge. If the whole subject were narrowed to this focus, plaintiff might be deemed to have failed with respect to some categories of film products.

It is to be remembered, however, that the measure of damages starts from a thorough demonstration that defendant was exercising unlawful monopoly power and charging prices yielding clearly monopolistic returns. Where the competition was so thin as to approach nonexistence, we might plausibly have started with Kodak's remarkably huge rate of return on investment on film (ranging from 61% to 70% over the years in question), considered the evidence as to sharply lower rates of return on non-monopolized products (demonstrated with respect to some of Kodak's lines), and employed the difference as

a basis for computing the unlawful excess. Indeed, plaintiff proposed several such means of computing film overcharge damages. Two were withdrawn after the court intimated an adverse ruling, and the third and final one, PX 6257 for identification, based on application of Kodak's roughly 30% return on investment on x-ray film sales, was not allowed by the court to be placed before the jury. The damages computed on PX 6257, $25,181,000, far exceed the more generous of the two price comparison measures the jury was permitted to consider, and would be more than double the actual award.

Kodak urged, and the court agreed, that comparisons with other manufacturers' prices would yield a more appropriate approximation—on a matter for which approximations are, after all, the best we can achieve. Starting from this base, the jury was admonished that plaintiff could recover nothing on account of higher Kodak prices resulting from "circumstances and conduct on Kodak's part that were lawful and permissible—such factors as higher quality, better marketing methods, superior service, customer preference and elements urged by defendant."

The jury was also instructed that it could accept or reject Berkey's contentions regarding comparability in whole or in part. In awarding a sum $3,203,000 less than the maximum claim Berkey was allowed to place before it, the jury may well have exercised judgment as to the imperfect comparability of competing film with Kodak film. A finding of differences in film quality would not require a conclusion that they account for the entire price difference. Nor does the scarcity of comparable film in some market sectors demonstrate the absence of injury. Recalling the vastly more generous award that would result from comparison to the non-monopolized x-ray film market, while standing behind the ruling eschewing unnecessary specula-

tion, and granting that the basis for finding comparability (even though all the evidence points to identical species of consumer uses) is hardly conclusive, the court does not find that the actual sum awarded must be condemned as unreasonable.

Taking the pertinent evidence as a whole, and stressing again the familiar principle that an injured antitrust plaintiff is often unable, and is not required to prove damages with close precision, the court concludes once again that the film damage award, if undoubtedly generous, was within the range of permissible jury judgment.

III.

The trial began with a jury of six and six alternates. As a result of a procedural modification initiated by the court on its own motion, defendant's liability was eventually determined by a unanimous jury of ten rather than six.[15] Much later, after six days of deliberations on liability, one juror was excused by the court in a telephone call in the

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[15] After the trial had been under way for three months or so, the court realized that because the proceedings were bifurcated, an avoidable complexity might arise at the end of the first phase if customary practice was followed. That is, if the alternates were excused when liability deliberations began, and if, as came to be the case, defendant was found liable, we would proceed to the damages trial (of substantially greater length than most trials) with no alternates at all. To avoid this the parties were invited to stipulate, and did stipulate, that all jurors, regulars and alternates, who remained with us when it came time to decide would participate in seeking a verdict, all thus becoming "regular" jurors; that the same rule would apply to both phases of the case; and that a unanimous verdict would be required no matter what number participated, provided that there was no agreement to accept a verdict by any number less than six. Shortly after this stipulation was reached, the court, with the consent of counsel, excused one of the twelve jurors whose husband had suffered a heart attack.

wake of a snowstorm that had closed the courthouse (and the City) when she complained of chest pains that had persisted for some days and insisted she had to go to the hospital. Two hours after this had happened and about 1½ hours after being informed, defense counsel said he was "concerned" that the court had "acted hastily" in excusing the juror with asserted chest pains, but made no such suggestion as is now made, that the episode should be deemed an error warranting a mistrial.[16] On the same day of paralyzing weather, when there was a general comedy of errors that amused nobody in assembling our jury, the court, with counsel's consent, went to the jury room to notify the jurors about meal arrangements, why we were waiting, and what the schedule would be. Seeking to set aside the verdict returned on the afternoon of the next day and citing the distinguishable criminal law precedent of *United States* v. *United States Gypsum Co.*, 46 U.S.L.W. 4937 (June 29, 1978), defendant urges that these episodes require a new trial of this case that took some seven months to try the first time. Beyond the *Gypsum* citation, there is no effort to brief the law or the facts involved. There is no suggestion of how Kodak might have been prejudiced by any of these incidents. There is no indication, and the court knows of no reason to believe, that the juror who was excused—and who would have been an excused alternate but for the court's prior intervention mentioned above—might have had a special place in her

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[16] It seems fair to treat the present contention as a belated, retrospective motion for a mistrial. For the practical effect of what has happened is that Kodak, while registering its criticism at the trial, without seeking relief and after nothing could be done about it anyhow, made no suggestion that the trial should be stopped, took its chances on the verdict, and now wants the adverse result erased.

heart or mind for Kodak. It is difficult to know how defendant now imagines there is merit in complaining about the excused juror or the other attendant events. See *United States* v. *Houlihan,* 332 F.2d 8, 13 (2d Cir.), cert. denied, 379 U.S. 828 (1964); *United States* v. *Pacente,* 503 F.2d 543 (7th Cir.), cert. denied, 419 U.S. 1048 (1974). See also *United States* v. *Rodriguez,* 545 F.2d 829 (2d Cir. 1976), cert. denied, 434 U.S. 819 (1977); *United States* v. *Diggs,* 522 F.2d 1310 (D.C. Cir. 1975), cert. denied, 429 U.S. 852 (1977); *United States* v. *Maxwell,* 383 F.2d 437, 443 (2d Cir. 1967), cert. denied, 389 U.S. 1057 (1968); *United States* v. *Woodner,* 317 F.2d 649 (2d Cir.), cert. denied, 375 U.S. 903 (1963).

In these circumstances, with all deference to distinguished counsel, it may be that this bare assertion of fatal errors at this time in this civil case by this party is unlikely to be remembered as an ornament in the judicial process.

Defendant's motions are in all respect [sic] denied.

It is so ordered.

Dated, New York, New York
August 8, 1978

MARVIN E. FRANKEL
U.S.D.J.

APPENDIX E

Liability Verdict

QUESTIONS FOR THE JURY'S DECISION

(1) Has Berkey proved its charge that Kodak monopolized the market it alleges in conventional amateur cameras to the injury of Berkey in its business or property?

Yes √ No ___

(2) Has Berkey proved its charge that Kodak monopolized the market in color print paper to the injury of Berkey in its business or property? Yes √ No ___

(3) Do you find from a preponderance of the evidence that there is a relevant market for amateur film consisting of amateur black and white, amateur color movie, amateur color slide, and amateur conventional color print film, but excluding instant color print film? Yes √ No ___

If the answer to question 3 is "yes" continue with question 4. If the answer to question 3 is "no" skip to question 5.

(4) Has Berkey proved its charge that Kodak monopolized the market for amateur film described in question 3 to the injury of Berkey in its business or property?

Yes √ No ___

If the answer to question 4 is "yes" skip to question 15. If the answer to question 4 is "no" skip to question 16.

(5) Do you find from a preponderance of the evidence that there is a single relevant market for amateur film consisting of amateur black and white, amateur color movie, amateur color slide, amateur conventional color print film, and also including instant color print film?

Yes ___ No ___

Appendix E—Liability Verdict

If the answer to question 5 is "yes" continue with question 6. If the answer to question 5 is "no" skip to question 7.

(6) Has Berkey proved its charge that Kodak monopolized the market for amateur film described in question 5 to the injury of Berkey in its business or property?

Yes ____ No ____

If the answer to question 6 is "yes" skip to question 15. If the answer to question 6 is "no" skip to question 16.

(7) Do you find from a preponderance of the evidence that there is a separate relevant market for amateur film consisting solely of amateur color movie film?

Yes ____ No ____

If the answer to question 7 is "yes" continue with question 8. If the answer to question 7 is "no" skip to question 9.

(8) Has Berkey proved its charge that Kodak monopolized the market for amateur film described in question 7 to the injury of Berkey in its business or property?

Yes ____ No ____

Continue with question 9.

(9) Do you find from a preponderance of the evidence that there is a separate relevant market for amateur film consisting solely of amateur color slide film?

Yes ____ No ____

If the answer to question 9 is "yes" continue with question 10. If the answer to question 9 is "no" skip to question 11.

(10) Has Berkey proved its charge that Kodak monopolized the market for amateur film described in question 9 to

the injury of Berkey in its business or property?

Yes ____ No ____

Continue with question 11.

(11) Do you find from a predonderance of the evidence that there is a separate relevant market for amateur film consisting solely of amateur conventional color print film, but excluding instant color print film? Yes ____ No ____

If the answer to question 11 is "yes" continue with question 12. If the answer to question 11 is "no" skip to question 13.

(12) Has Berkey proved its charge that Kodak monopolized the market for amateur film described in question 11 to the injury of Berkey in its business or property?

Yes ____ No ____

If you answered question 12 skip to question 15.

(13) Do you find from a preponderance of the evidence that there is a separate relevant market for amateur film consisting of amateur conventional color print film together with instant color print film? Yes ____ No ____

If the answer to question 13 is "yes" continue with question 14. If the answer to question 13 is "no" skip to question 15.

(14) Has Berkey proved its charge that Kodak monopolized the market for amateur film described in question 13 to the injury of Berkey in its business or property?

Yes ____ No ____

Continue with question 15.

(15) You should answer question 15 only if you have answered "yes" to any one of questions 4, 6, 8, 10, 12, or 14.

Appendix E—Liability Verdict

If you did not answer "yes" to any one of those questions, skip to question 16.

Do you find from a preponderance of the evidence that Kodak's monopolization of a film market or markets has been used by Kodak to foreclose competition, to gain a competitive advantage, or to destroy a competitor in the market or markets in which the following products are sold, to the injury of Berkey in its business or property?

	Yes	No
(a) Conventional amateur cameras:	Yes √	No
(b) Color print paper:	Yes √	No
(c) Amateur movie cameras:	Yes √	No
(d) Photofinishing services:	Yes √	No
(e) Photofinishing equipment:	Yes √	No
(f) Color negative printers:	Yes √	No
(g) Photofinishing chemicals:	Yes √	No

(16) Has Berkey proved its charge that Kodak unlawfully attempted to monopolize the market it alleges in conventional amateur cameras to the injury of Berkey in its business or property? Yes √ No

(17) Has Berkey proved its charge that Kodak unlawfully attempted to monopolize the market in color print paper to the injury of Berkey in its business or property?

Yes No √

(18) Has Berkey proved its charge that Kodak unlawlawfully attempted to monopolize the market in amateur movie cameras to the injury of Berkey in its business or

property? Yes ___ No √

(19) Has Berkey proved its charge that Kodak unlawfully attempted to monopolize the market in photofinishing to the injury of Berkey in its business or property?

Yes ___ No √

(20) Do you find from a preponderance of the evidence that there is a relevant market for amateur film consisting of amateur black and white, amateur color movie, amateur color slide, and amateur conventional color print film, but excluding instant color print film? [Note that this is the same question as question 3 above and must have the same answer as you gave to question 3.] Yes √ No ___

If the answer to question 20 is "yes" continue with question 21. If the answer to question 20 is "no" skip to question 22.

(21) Has Berkey proved its charge that Kodak unlawfully attempted to monopolize the market for amateur film described in question 20 to the injury of Berkey in its business or property? Yes ___ No √

If you answered question 21 skip to question 32.

(22) Do you find from a preponderance of the evidence that there is a single relevant market for amateur film consisting of amateur black and white, amateur color movie, amateur color slide, amateur conventional color print film, and also including instant color print film? [Note that this is the same question as question 5 above and must have the same answer as you gave to question 5.]

Yes ___ No ___

If the answer to question 22 is "yes" continue with question 23. If the answer to question 22 is "no" skip to question 24.

(23) Has Berkey proved its charge that Kodak unlawfully attempted to monopolize the market for amateur film described in question 22 to the injury of Berkey in its business or property? Yes ____ No ____

If you answered question 23 skip to question 32.

(24) Do you find from a preponderance of the evidence that there is a separate relevant market for amateur film consisting solely of amateur color movie film? [Note that this is the same question as question 7 above and must have the same answer as you gave to question 7.]

Yes ____ No ____

If the answer to question 24 is "yes" continue with question 25. If the answer to question 24 is "no" skip to question 26.

(25) Has Berkey proved its charge that Kodak unlawfully attempted to monopolize the market for amateur film described in question 24 to the injury of Berkey in its business or property? Yes ____ No ____

Continue with question 26.

(26) Do you find from a preponderance of the evidence that there is a separate relevant market for amateur film consisting solely of amateur slide film? [Note that this is the same question as question 9 above and you must have the same answer as you gave to question 9.]

Yes ____ No ____

If the answer to question 26 is "yes" continue with question 27. If the answer to question 26 is "no" skip to question 28.

(27) Has Berkey proved its charge that Kodak unlawfully attempted to monopolize the market for amateur film described in question 26 to the injury of Berkey in its

busines or property? Yes ___ No ___

Continue with question 28.

(28) Do you find from a preponderance of the evidence that there is a separate relevant market for amateur film consisting solely of amateur conventional color print film, but excluding instant color print film? [Note that this is the same question as question 11 above and must have the same answer as you gave to question 11.]

Yes ___ No ___

If the answer to question 28 is "yes" continue with question 29. If the answer to question 28 is "no" skip to question 30.

(29) Has Berkey proved its charge that Kodak unlawfully attempted to monopolize the market for amateur film described in question 28 to the injury of Berkey in its business or property? Yes ___ No ___

If you answered question 29 skip to question 32.

(30) Do you find from a preponderance of the evidence that there is a separate relevant market for amateur film consisting of amateur conventional color print film together with instant color print film? [Note that this is the same question as question 13 above and must have the same answer as you gave to question 13.] Yes ___ No ___

If the answer to question 30 is "yes" continue with question 31. If the answer to question 30 is "no" skip to question 32.

(31) Has Berkey proved its charge that Kodak unlawfully attempted to monopolize the market for amateur film described in question 30 to the injury of Berkey in its business or property? Yes ___ No ___

Appendix E—Liability Verdict

Continue with question 32.

(32) Has Berkey proved its charge that Kodak was a party to a contract, combination or conspiracy with Sylvania which unreasonably restrained trade, to the injury of Berkey in its business or property? Yes √ No ___

(33) Has Berkey proved its charge that Kodak was a party to a contract, combination, or conspiracy with General Electric which unreasonably restrained trade, to the injury of Berkey in its business or property? Yes √ No ___

(34) Has Berkey proved its charge that Kodak received preferential price treatment from Sylvania in violation of § 2(f) of the Robinson-Patman Act, to the injury of Berkey in its business or property? Yes √ No ___

(35) Has Berkey proved its charge that Kodak received preferential price treatment from General Electric in violation of § 2(f) of the Robinson-Patman Act, to the injury of Berkey in its business or property? Yes √ No ___

Jan. 21, 1977 [sic]

CAROL HILLIARD
1-21-77 [sic]

APPENDIX F

Damages Verdict

QUESTIONS FOR THE JURY'S DECISION

(1) (a) Do you find that Berkey is entitled to recover compensatory damages for overcharges on amateur film? (Charge, pages 10-14) Yes √ No

(b) If your answer to (a) is "Yes," state the amount of Berkey's compensatory damages on this claim: $11,500,000

(2) (a) Do you find that Berkey is entitled to recover compensatory damages for overcharges on color print paper? (Charge, pages 15-17) Yes √ No

(b) If your answer to (a) is "Yes," state the amount of Berkey's compensatory damages on this claim: $8,803,000

(3) (a) Do you find that Berkey is entitled to recover compensatory damages for overcharges on photofinishing equipment? (Charge, pages 18-19) Yes √ No

(b) If your answer to (a) is "Yes," state the amount of Berkey's compensatory damages on this claim: $19,000

(4) (a) Do you find that Berkey is entitled to recover compensatory damages for lost sales on magicube cameras for the last six months of 1970? (Charge, pages 23-24) Yes √ No

(b) If your answer to (a) is "Yes," state the amount of Berkey's compensatory damages on this claim for the last six months of 1970: $330,000

(5) (a) Do you find that Berkey is entitled to recover compensatory damages for lost sales on magicube cameras for the year 1971? (Charge, pages 23-24) Yes √ No

(b) If your answer to (a) is "Yes," state the amount of Berkey's compensatory damages on this claim for the year 1971: $1,417,330

(6) (a) Do you find that Berkey is entitled to recover compensatory damages for lost sales on 110 cameras? (Charge, pages 25-29) Yes √ No

(b) If your answer to (a) is "Yes," state the amount of Berkey's compensatory damages on this claim: $15,250,000

(7) (a) Do you find that Berkey is entitled to recover compensatory damages for lost sales on movie cameras? (Charge, pages 30-32) Yes No ×

(b) If your answer to (a) is "Yes," state the amount of Berkey's compensatory damages on this clam: $ None

(8) (a) Do you find that Berkey is entitled to recover compensatory damages for lost photofinishing sales? (Charge, pages 33-34) Yes √ No

(b) If your answer to (a) is "Yes," state the amount of Berkey's compensatory damages on this claim: $55,700

(9) (a) Do you find that Berkey is entitled to recover compensatory damages for Kodak's receipt of a discriminatory discount on magicubes? (Charge, pages 35-39) Yes √ No

(b) If the answer to (a) is "Yes," state the amount of Berkey's compensatory damages on this claim: $200,000

(10) (a) Do you find that Berkey is entitled to recover compensatory damages for Kodak's receipt of a discriminatory discount on flipflash units? (Charge, pages 35-39) Yes √ No

(b) If your answer to (a) is "Yes," state the amount of Berkey's compensatory damages on this claim: $45,100

CAROL HILLIARD
March 22, 1978

APPENDIX G

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws. . . ."

No. 79-427

Supreme Court, U. S.
FILED
OCT 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

BERKEY PHOTO, INC.,

Petitioner,

v.

EASTMAN KODAK COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KODAK'S BRIEF IN OPPOSITION

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October 15, 1979

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IN THE

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October Term, 1979

No. 79-427

BERKEY PHOTO, INC.,

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EASTMAN KODAK COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KODAK'S BRIEF IN OPPOSITION

Petitioner Berkey Photo, Inc. ("Berkey") seeks review of the court of appeals' disposition of virtually every claim for damages in this multifaceted, prolonged and factually complex case. Berkey's petition repeatedly misrepresents the reasoning and holdings of the court of appeals, and in effect asks this Court not for certiorari on the law but for another appellate review of the evidence adduced at an 8-month trial.

Far from constituting a transgression of the Seventh Amendment (Pet. 3, 25) or creating "avulsive changes in § 2 jurisprudence" (Pet. 19), the court of appeals' dismissal of Berkey's camera monopolization claim—the only

claim it finally adjudicated in Kodak's favor—was based on a careful and comprehensive review of "the evidence and the possible inferences in the light most favorable to Berkey" (30a) and a faithful application of the legal principles consistently articulated by this Court since *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911).

All the other challenged rulings are interlocutory and require further proceedings in the district court. Since their decisional consequence is uncertain, they are not now ripe for review. Moreover, the court of appeals' only error in directing further proceedings on Berkey's huge film and paper "overcharge" claims was error in Berkey's favor, as discussed in our conditional cross-petition (No. 79-499).

The decision of the court of appeals was rendered after full consideration of lengthy briefs and several hours of oral argument canvassing a record of 18,000 transcript pages and 3,000 exhibits. Its analysis of Berkey's claims and the evidence is reasoned and thorough, and presents no occasion for certiorari.

Questions Presented

1. Was the court of appeals correct in holding that a plaintiff in a treble-damage action must show wrongful conduct to establish a violation of § 2 of the Sherman Act (18a-22a), and that a leading firm's introduction of new products without "predisclosure" does not itself constitute such wrongful conduct (32a-45a)?

2. Was the court of appeals correct in holding that a treble-damage plaintiff must prove a causal link between alleged violations of law and alleged injuries and damages (71a-75a)?

Statement

Eastman Kodak Company ("Kodak") has been for many years the leading firm in virtually all phases of the photographic industry. Berkey has been for many years a leading photofinishing firm, and as such has been both a competitor of Kodak in photofinishing and a customer for Kodak's films, photographic print papers, and photofinishing equipment and chemicals (4a-5a).

Berkey began to compete with Kodak as a camera manufacturer in 1969, when it started producing cameras in the 126 format (10a; E 1173). The 126 or "Instamatic" camera, which featured easy cartridge loading, had been introduced by Kodak in 1963 and by 1969 had virtually displaced the old box-roll "Brownie" type cameras in the marketplace (E 1184). In March 1972, after a decade of development work, Kodak introduced what became the most successful amateur photographic products in history, the 1″ thick 110 or "Pocket Instamatic" camera, a correspondingly small film cartridge and a new fine-grain color print film (see 26a, 29a).[1]

Kodak made relevant specifications of the 110 camera and its interfacing cartridge, including manufacturing tolerances, available to other camera manufacturers for a total

---

[1] Due to lower labor costs, Far Eastern manufacturers have entirely preempted production of the labor-intensive 35mm camera and have become a major force in domestic sales of mass market cameras as well (A 602-03, A 1151-52, E 616). Through product innovation, manufacturing efficiency and quality control, Kodak has nonetheless maintained a strong position in mass market cameras (9a; A 1151-53), and despite increasing challenges for technological leadership by major Japanese rivals (A 587-88, A 1352, A 1359), Kodak has held its preeminent position in the development and production of highly sophisticated light-sensitive materials, *i.e.*, photographic films and papers (11a; A 610, A 651, A 2386, E 3166). Kodak makes a net contribution of about $1 billion annually to the United States balance of payments and provides tens of thousands of stable and well-paid jobs.

fee of $60,000 about two months before introducing the new system (34a-35a; A 1318-20, E 3299, E 3313-16) and offered them licenses under all its relevant United States patents for a nominal royalty (a maximum of $10,000 annually) (E 3216e). Kodak refused, however, to accede to Berkey's subsequent demand for substantially broader and much earlier advance disclosure of Kodak's future innovations, and, in consequence, Berkey filed this action in January 1973 (A 2233-34, E 1072-76).

Berkey's principal claim at trial was that Kodak's introduction of the 110 system without "predisclosure" violated § 2 and caused Berkey unlawful injury as a competitor in the camera and photofinishing markets and as a purchaser of film and photofinishing equipment (31a-32a, 102a, 120a, 128a).

Berkey also, however, asserted a multitude of other claims, under both § 2 and various other provisions of the antitrust laws. Among the more prominent were claims of monopolization based on the "quality" of Kodak's products (32a, 47a-49a, 113a, 115a), the "need" for Kodak's product innovations (*id.*), the content of Kodak's advertising (28a-29a, 128a) and the fact that Kodak identified its products as made by it (62a-63a, 135a). Berkey further charged that Kodak violated § 2 by continually impairing the product quality of the photofinishing industry (121a), which produces and delivers to consumers the final products (prints and slides) made from over 90% of Kodak's film, in order to "gain a competitive advantage" for Kodak's own photofinishing business.[2] Berkey also challenged joint de-

[2] Kodak's photofinishing services are priced at a premium, and its share of this market (color and black & white) declined from 19% in 1956 to 9% in 1976 (E 619, E 620). Photofinishing contributes less than 2% of Kodak's profits (E 1176, E 1177, C 215), and Kodak's self-interest obviously lies in maximizing the product quality of the whole photofinishing industry.

velopment projects between Kodak and manufacturers of flash devices as unlawful under § 1 (80a-87a).[3]

An allegation not focused on at trial, but heavily emphasized in the court of appeals and here, was that Kodak "consistently refused to make its film available" for new formats developed by other camera manufacturers (Pet. 9). Berkey did not allege that it had ever designed a camera in a new format, much less that it had been refused Kodak film for such a camera.[4] It also adduced so little proof regarding this subject that the district court, though including virtually every other of Berkey's allegations in its hundred-page charge (A 218-336), refused to include this one, saying that "if there is any basis for an argument left here, it seems to me to be minute" (A 2337-39). Berkey conceded in the court of appeals that it had not stated a claim for relief based on the supposed unavailability of Kodak film (43a).[5]

The Camera Award. Berkey's camera damage award, $15,250,000 before trebling, was based solely on Kodak's

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[3] Other of Berkey's claims and charges are listed in the opinion of the court of appeals (5a-6a n.1). The allegations of wrongful conduct urged by Berkey in support of its paper "overcharge" claim are discussed in detail in the first of the district court's two opinions (133a-138a).

[4] Berkey's own officers acknowledged that "we don't invent" (E 295) and that its commercial success was due to "fallout from Kodak" (A 1033).

[5] The court of appeals, far from concluding that an unjustified refusal to make film available would be "irrelevant" (Pet. 14-15), said that, if proven and shown to cause injury to a plaintiff, it might well provide a basis for recovery (42a-43a). The only specific evidence Berkey adduced on film availability related to the Minox "spy camera," which Berkey had distributed for a foreign manufacturer in earlier years (A 595-96). Berkey acknowledged that the Minox was too expensive to be a mass market camera, and it was not a part of the camera market defined by the jury (A 238, A 2336-37). Moreover, Berkey asserted no claim related to sales of the Minox (43a).

failure to "predisclose" the 110 system so that Berkey could "be at the starting line when the whistle blows" (A 124). Berkey's claim of injury was not related to any decline in its sales from the levels of prior years, but to its failure to achieve what it claimed was its "fair share" of the market as expanded by demand for the 110 camera (45a & n.29). This formulation of Berkey's damage claim was necessary because Berkey, like Kodak's other competitors, had its best years ever after the 110 introduction.[6] The district court sustained the award after "a frequently subtle, inevitably comprehensive appraisal of [Kodak's] actions" (114a) led it to conclude that "the jury could have found the 110 introduction a scheme contrived almost

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[6] Kodak's competitors were in the market with their own 110 cameras beginning in late 1972 (29a), and they also enjoyed their highest camera sales ever with their existing models that year. Berkey's 1972 sales, for example, were 50% higher than any previous year (C 392). Kodak's introduction of the new 110 system, as is often the case with major product developments, stimulated sales in the entire market, as shown by the following table:

*Domestic Camera Sales 1968-1977, in Millions**

Year	Total Sales	Kodak's Sales	Others' Sales**	Berkey's Sales
1968	7.3	5.2	2.1	.05
1969	7.3	5.3	2.0	.20
1970	5.8	3.8	2.0	.39
1971	6.2	4.3	1.9	.46
1972	8.2	5.6	2.5	.73
1973	9.7	7.2	2.5	.61
1974	8.3	5.6	2.7	.76
1975	8.2	5.2	3.0	.60
1976	8.3	4.3	3.9	.84
1977	8.3	3.0	5.3	.78

* Excluding instant, 35mm, professional and movie cameras.

** Including Berkey.

Sources: E 1306, E 1184, E 2493, C 392.

wholly to crush competitors, and scarcely or not at all to compete by serving consumers better" (113a).[7]

The court of appeals, "construe[ing] the evidence and the possible inferences in the light most favorable to Berkey" and taking into account "the interrelationships among . . . the individual markets" over many years (8a, 30a), describes Berkey's claims and arguments fully, often assuming proof in support of Berkey's position where none existed (25a-55a). Berkey consequently does not dispute any part of the court's factual presentation; instead it distorts the court's conclusions and then attacks those distortions.[8]

In ruling on the camera claim, the court of appeals held that wrongful conduct is an essential aspect of a treble damage claim under § 2, and that the introduction into the marketplace of new and additional products, far from being "restrictive" or "anticompetitive," expands choice and is the very essence of competition on the merits (18a-22a, 25a-55a).

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[7] The charge to the jury continually reiterated this supposed dichotomy between "benefiting consumers . . . through better products" and "injury to competitors" by offering consumers the opportunity to purchase "inferior" products (*e.g.*, A 251, A 255-64). The court of appeals did not, as Berkey asserts (Pet. 13), condone these and other aspects of the charge, but expressly rejected them (48a-49a).

[8] Though not attacking the factual statements of the court of appeals concerning Kodak's actions, Berkey paints a black picture of Kodak's "intent" (Pet. 11). The documents quoted by Berkey either say the opposite of what Berkey implies or state proposals that were not adopted. Thus, the entire point of E 1817 was that the Pocket Instamatic was *not* a "cute little camera"; the author of the "hammerlock" memo was suggesting that Kodacolor II *not* be emphasized in advertising the 110 system, a suggestion that was followed as the advertising focused on the "pocketable" camera (53a; see E 2497-2899); and the suggestion in E 1307 that film sales would be encouraged if the Pocket Instamatic were not priced at a premium, was rejected, and the Pocket Instamatic was priced substantially higher than Kodak's 126 cameras (E 1160, E 1161). Such misrepresentative recitations of "evidence" are the hallmark of Berkey's approach to the judicial process.

The court of appeals did not hold, nor did Kodak ever assert, that "deliberately exclusionary conduct . . . [should] be deemed *per se* lawful . . . because it was . . . associated with product introduction" (Pet. 3, 7, 26). The quotation attributed to Kodak (Pet. 6) is the rhetoric of the district court, and the court of appeals expressly rejected any such holding since wrongful conduct "associated with" new products is obviously no different from wrongful conduct "associated with" old products (46a). Similarly, contrary to Berkey's complaint that the court of appeals "created enclaves of immunity" for " 'leveraging' of monopoly power" (Pet. 3, 7, 14, 15, 27), the court expressly endorsed Berkey's "leveraging" theory (22a-25a); it simply disagreed that the production of a smaller, finer-grain film for use in a new smaller camera constituted unlawful "leveraging" (40a-41a, 51a-55a).

In like vein, Berkey's defensive characterizations of its "predisclosure" demand as "non-technical" (Pet. 14) and "not involving any information whatever about cameras" (*id.* at 3, 11-13, 30) are both revealing of the importance of "predisclosure" in the case and false.

Berkey said before trial that it was entitled to disclosure of all "relevant facts" at the same time such facts were communicated within Kodak, as well as "invitations to participate in committees to coordinate the development of products" (C 438). With respect to the 110 system, Berkey set forth 50 steps of required "predisclosure" by Kodak to camera manufacturers from August 1963 to February 1974, including such items as a requirement to disclose "tentative decisions on details of body, lens, film advance and ASA" in June 1967 (C 439-43). Berkey's counsel repeatedly adverted to "predisclosure" during trial (see A 265) and interrupted Kodak's trial counsel's summation to tell the jury that Berkey was entitled to 5 years ad-

vance notice of the 110 system (A 413), even though Berkey was not a camera manufacturer 5 years before introduction of the 110.

The Film and Color Print Paper Awards. Berkey's claim of monopolization of the amateur film market was based principally upon the 110 introduction in 1972, which the district court held unlawful in this context on the ground that it had "the express purpose and clear effect of buttressing Kodak film sales" (128a). The district court also condemned Kodak's restriction of its own photofinishing business to the processing of Kodak film (128a-129a). No proof was adduced that either of these "wrongful acts" had anything to do with Kodak's film prices, but Berkey was nonetheless awarded "overcharge" damages of $11,500,000, untrebled, on all sizes and types of Kodak film it purchased during the statutory period, 1969 through 1977.

Berkey's claim of unlawful conduct in the color print paper market, which the district court ultimately rejected (133a-138a), similarly bore no relationship to that "overcharge" award ($8,803,000, before trebling).

In its first post-trial opinion, the district court advanced the concept of an "overcharge" award as a penalty for monopoly power rather than as compensation for injury suffered by reason of a violation of the law, but suggested that it need not "go this far" (127a n.20). In its second opinion, however, when it confronted the absence of any causal link between Kodak's prices and Berkey's allegations, the district court finally held that no causal link, direct or indirect, was required for recovery (175a).

The district court never addressed the fact that Berkey freely chose to purchase Kodak film and paper despite the availability throughout the statutory period of competitors' lower-priced products, nor the fact that Berkey failed

to prove that anything other than quality and consumer preference accounted for Kodak's price premium.[9]

The court of appeals, noting that the two allegedly wrongful acts relied upon by the district court in the film market could not "have had a very large impact on Kodak's film prices" (75a), held that Berkey, like every other tort plaintiff, had to present evidence that its injury "flowed from" the alleged unlawful acts (71a-74a).[10] The court of appeals remanded both the film and paper claims, however, for retrial under the legal standards it set forth, including a determination of whether allegedly wrongful conduct antedating the statutory period caused damages continuing into the statutory period (74a-76a). (See our conditional cross-petition in No. 79-499.)[11]

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[9] Since there was no proof either of any foreclosure of the channels of distribution or of any capacity limitations that would have made Kodak in effect a supplier of last resort, the only conclusion possible is that consumers paid premium prices for Kodak products as a matter of freely exercised personal choice. This was conceded by Berkey's counsel, who stated with respect to other films, "You couldn't sell them. No one would buy them." (A 1785)

[10] In the court below, Berkey disparaged any standard requiring that it establish " 'causation-in-fact' " (Berkey Brief, March 16, 1979, at 120), and here it characterizes this requirement, fundamental to the whole of tort law, as "unprecedented" (Pet. 3). Berkey then asserts that the Court should reinstate the film and paper awards because Kodak's prices were the "result" of Kodak's "monopolization" (Pet. 7-8). Such a causal connection between acts of monopolization and prices is, of course, what Berkey failed to prove at the first trial and has been given a second chance to establish.

[11] Far from not "questioning the legal sufficiency of the jury verdicts" of film and paper monopolization (Pet. 7, 19), the court of appeals' rejection of Berkey's contention that the 110 introduction was unlawful in the camera market was applicable *a fortiori* to the film market. The court also rejected Berkey's claims of unlawful "systems selling" (46a) and unlawful introduction of "inferior" products (48a-49a), and said it had "no occasion to consider" Berkey's other claims of wrongful conduct (76a).

The Photofinishing and § 1 Awards. The two photofinishing damage awards ($55,700 and $19,000, before trebling) were based on Kodak's failure to "predisclose" the 110 system. Berkey claimed to have been unlawfully injured by Kodak's six-week "headstart" in 110 film processing (about 1/10 of 1% of the processing business done during that period) and by Kodak's sale of allegedly defective and overpriced 110 processors. The court of appeals, though finding the 110 introduction to be otherwise lawful, remanded the claims for a determination of whether Kodak had in some unlawful way thereby obtained any "competitive advantage" in the photofinishing market (22a-25a, 56a-63a).

Berkey's two claims under § 1 of the Sherman Act were for lost camera sales allegedly resulting from Kodak's joint development programs with flashlamp manufacturers, which led to the introduction in 1970 and 1975 of new flash devices and compatible cameras. These claims were unrelated to the 110 introduction and were sustained by both the district court and the court of appeals (76a-87a). The district court, however, overturned a damage award for the year 1971 as lacking "any rational relationship to any wrong for which Kodak may be held liable" (125a-126a). The court of appeals disagreed with the total rejection of the award, but said the district court could properly have found it "excessive" and remanded for redetermination of the amount of damages (87a-90a).

ARGUMENT

I.

Controlling precedent mandated the dismissal of Berkey's camera claim under § 2 of the Sherman Act.

A. Contrary to Berkey's position (Pet. 19-21), a cause of action for treble damages based on § 2 is not made out by showing possession of monopoly power—it requires as well proof of the "willful acquisition or maintenance" of that power to the demonstrable injury of the plaintiff by means of acts which are "unlawful and exclusionary," *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71, 576 (1966). Such "unlawful and exclusionary" acts are those which by predation, coercion, or restriction deny others "access to the market," *United States* v. *Griffith*, 334 U.S. 100, 108 (1948), and "exclude them from their right to trade," *Standard Oil Co.* v. *United States*, 221 U.S. 1, 76 (1911).

Kodak's introduction of a new and additional photographic system, in competition with cameras and films already on the market, was neither unlawful in nature nor "exclusionary" in effect. Rather it exemplified precisely the "superior product [or] business acumen," *United States* v. *Grinnell Corp.*, 384 U.S. at 571, and "the process of invention and innovation," *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 344 (D. Mass. 1953), *aff'd mem.*, 347 U.S. 521 (1954), that, throughout the history of the Sherman Act, have been regarded as the epitome of competition itself.[12] Far from restraining trade,

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[12] *See id.*; *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 390-91 n.15 (1956) (quoting legislative history of the Sherman Act); *Standard Oil Co.* v. *United States*, 221 U.S. at 75;

(footnote continued on following page)

the development and marketing of the 110 system actually and literally created commerce.[13]

The ambiguous and imprecise language of *Alcoa* [14] cannot be read to prohibit "monopoly in the concrete," *Standard Oil Co.* v. *United States,* 221 U.S. at 62, and it has not been so read by this Court. *See American Tobacco Co.* v. *United States,* 328 U.S. 781, 786 (1946) (describing *Alcoa* as involving the "use of various unlawful means," to be contrasted with "a new discovery or an original entry into a new field"); *United States* v. *Grinnell Corp., supra.* In rejecting Berkey's contrary argument, the court of appeals did no more nor less than construe and apply *Alcoa* in accordance with the overwhelming force of authority (18a-24a).

Berkey's claim of unlawful injury from competitive innovation is noteworthy only in its rejection, indeed inversion, of basic legal principles. If wrongful conduct is not required for the recovery of damages, then the concepts of causation and injury must also be discarded. The end of such a path is not law as we know it, but arbitrary transfers of wealth according to the subjective value judgments of judges and juries. *Cf. TVA* v. *Hill,* 437 U.S. 153, 195 (1978).

(footnote continued from preceding page)

Telex Corp. v. *IBM,* 510 F.2d 894, 925-28 (10th Cir.), *cert. dismissed,* 423 U.S. 802 (1975). *See also* U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 60 (1955) (monopolies do not monopolize "by being active, enterprising and dynamic," conduct meant to be encouraged by the antitrust laws); III P. AREEDA & D. TURNER, ANTITRUST LAW 77-78 (1978).

[13] Berkey acknowledged in its complaint that the 126 introduction a decade earlier caused a market to "come into being" (A 8).

[14] *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945).

Moreover, Kodak's camera competitors were not "excluded" by the 110 system, even in Berkey's peculiar usage of that word to mean not sharing in someone else's success. Rather, the industry as a whole thrived upon introduction of the 110, which Berkey's top management described as "a tremendous advance in photography" (E 226) that is "giving us . . . a great boost" (E 252).

B. As noted above (page 8), the court of appeals created no "enclaves of immunity from § 2 scrutiny for willfully exclusionary conduct" (Pet. 3). Instead, it distinguished between the natural, proper and socially useful benefits of industrial integration and the misuse of monopoly power in related markets, termed "leveraging" by Berkey (22a-25a).[15] Nor did the court create a rule of "per se" legality for "conduct associated with product introduction" (Pet. 3, 26). Berkey's real, though disclaimed, complaint is that the court did not adopt a *per se* rule of illegality for a dominant firm's product innovation without "predisclosure" (see 37a-38a).

Berkey's novel demand for "predisclosure" is repugnant both to the concept of private property basic to our law and society, and to the express policy embodied in the federal patent and state trade secret laws, *see Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 484 (1974). As a matter of antitrust policy, "predisclosure" would have ob-

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[15] Berkey's "leveraging" premise—that consumers purchased the Pocket Instamatic camera (retailing for $30-$130) so that they would be able to use the allegedly defective Kodacolor II film—was both inherently incredible as a theory of human behavior and entirely devoid of evidentiary support. The court of appeals did not, as Berkey asserts here (Pet. 15), require untold numbers of consumers to testify; it only noted in closing that Berkey had failed to produce "anyone" to support the claim, when the evidence—if it existed—should have been readily available from Berkey's own retail store employees (54a-55a; A 2591-92). Nor did Berkey challenge testimony to the contrary (A 1370).

vious and significant anticompetitive, not pro-competitive, effects. *See United States* v. *National Lead Co.*, 332 U.S. 319, 359 (1947). The court of appeals' rejection of "pre-disclosure" accords with the only other case to have considered such a notion, albeit in a form far less drastic than that advanced by Berkey. *ILC Peripherals Leasing Corp.* v. *IBM*, 458 F. Supp. 423, 437 (N.D. Cal. 1978), *appeal docketed*, No. 78-3050 (9th Cir. Sept. 12, 1978).[16]

C. The court of appeals' rejection of Berkey's contentions creates no conflict with any of the decisions of this Court or other circuits cited by Berkey (Pet. 19-22), all of which involved monopolistic acquisitions or conspiracies, predatory or coercive conduct, or restrictive agreements foreclosing commerce. Nor does the opinion below have any astounding consequence for various complex and diverse government and private actions now pending in the lower courts (Pet. 22-23, n.36). Presumably the courts hearing those cases will apply the decisions of this Court to the facts before them as faithfully as the court of appeals did here.

Berkey erected a byzantine structure of inconsistent and improbable factual allegations and sought mightily to avoid traditional legal principles in order to arrive at the claim it now asks the Court to review in myriad detail and reinstate. The holding below was clearly correct, both under controlling precedent and as a rejection of massive "antitrust" litigation as a new form of corporate diversification.

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[16] Memorex, the plaintiff in *ILC*, sought only disclosure of interface specifications for new IBM computers at the time of announcement and for a fee. 458 F. Supp. at 437. Such disclosure was provided by Kodak two months before the 110 introduction (see pages 3-4, above).

II.

The film and paper "overcharge" claims are not ripe for review, and the court of appeals' ruling on causation conforms with statutory and decisional law.

The court of appeals remanded the film and paper "overcharge" claims to afford Berkey an opportunity to prove that its alleged injuries "flow from" wrongful conduct (71a-74a). In so doing, the court did not "add requirements beyond what is specifically set forth by Congress" (Pet. 33), but merely complied with the express language of § 4 of the Clayton Act, which allows recovery only for injuries actually sustained "by reason of" unlawful conduct. 15 U.S.C. § 15.

The requirement of a causal link between violation of law and injury is as basic in antitrust treble-damage actions as in common-law tort actions, and has been repeatedly reaffirmed by this Court. *E.g., Reiter* v. *Sonotone Corp.*, 99 S.Ct. 2326, 2332 (1979) (recovery may be had for prices "inflated by reason of . . . anticompetitive conduct"); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977) (injury must be attributable to "that which makes [the act] unlawful"); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) (injury must be "the certain result of the wrong"). As the court of appeals noted (72a n.56), this Court applied that requirement with full force to the claim for monopoly "overcharges" in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), upon which Berkey inexplicably places great reliance (Pet. 32).[17]

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[17] This Court's rejection of the "pass-on" defense in *Hanover Shoe* provides no support at all for dispensing with proof of causation of injury and damages. Hanover Shoe, unlike Berkey, had proved causation of injury in fact; absent such proof, liability would not have been established, and the "pass-on" defense would never have been considered.

The standard on remand allows Berkey to prove not only direct causation, *i.e.*, that prices it paid were raised by a wrongful act, *see* III P. AREEDA & D. TURNER, ANTITRUST LAW 73, 98-99 (1978), but also indirect causation—that price increases resulted from "distortion of the market" caused in turn by wrongful conduct (73a). Berkey failed to prove anything approaching direct causation at the first trial, and its present complaint that it cannot prove indirect causation either (Pet. 34-35) is reason not for awarding it tens of millions of dollars in "damages" from Kodak, but for dismissing its claims.

Moreover, a remand of the film claim was required aside from the failure to prove causation because it was put to the jury with clearly erroneous instructions on the relevance of "systems introduction" and product quality (*e.g.*, A 249-64) and was sustained by the district court principally on the erroneous thesis that the 110 introduction was unlawful (126a-129a).[18] As to the paper claim, Berkey can hardly complain of being given a second chance to prove its case, which also went to the jury under erroneous instructions regarding conduct and which the district court found insufficient as to both liability and damages (133a-138a).

III.

The court of appeals' remand of the photofinishing claims and one § 1 damage award presents no question for this Court.

Berkey asserts in its petition that the photofinishing services and equipment awards should have been sustained because the court of appeals "referred to no error which

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[18] The charge went so far as to permit a finding of film monopolization based solely on conduct affecting another market; the district court expressly recognized that if this nonsensical proposition, "which I have been bullied into accepting for our purposes, is held erroneous," Berkey "is wiped out on appeal" (A 1713).

affected the award" (Pet. 4). Aside from the fact that this Court does not grant certiorari "to review evidence and discuss specific facts," *United States* v. *Johnston,* 268 U.S. 220, 227 (1925), we note that Berkey's photofinishing claims were based on the 110 introduction, which the court of appeals "referred to" at some length (see 25a-63a).

Berkey also asks the Court to review the court of appeals' determination to remand rather than reinstate a § 1 damage award pertaining to the year 1971, an award that had been overturned by the trial court as based on nothing "more than speculation" (125a) and that the court of appeals suggested was probably "excessive" (89a-90a). Seeking certiorari on this issue, wholly a question of fact, is frivolous. *United States* v. *Johnston, supra.*

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

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October 15, 1979

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-427

BERKEY PHOTO, INC.,

Petitioner,

against

EASTMAN KODAK COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

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October 24, 1979

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IN THE

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BERKEY PHOTO, INC.,

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against

EASTMAN KODAK COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

This reply brief is submitted in support of Berkey's Petition for a Writ of Certiorari. We respectfully refer the Court to Berkey's brief in response to Kodak's cross-petition for certiorari in No. 79-499 which further demonstrates the urgent need for review of this cause. We submit that the contentions made in support of the instant petition are particularly compelling since, after a long jury trial, (i) the District Judge wrote two careful and detailed opinions on questions which he recognized to be difficult and of great importance for antitrust jurisprudence; (ii) the Court of Appeals reached contrary results on many of these questions, in an opinion which repeatedly notes the importance, complexity and novelty of the issues involved; and (iii) both sides have now sought certiorari.

1. Contrary to Kodak's contentions, the opinion below dramatically departed from existing law on monopolization and will have enormous and pernicious implications for Section 2 enforcement.

Berkey demonstrated (Petition, pp. 19-23) that the Court of Appeals' opinion was an abrupt change of the law on monopolization. Kodak's contention (Brief in Opposition, pp. 12-15) that prior controlling Section 2 cases such as *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *Griffith*, 334 U.S. 100 (1948); *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (*"Alcoa"*); and *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) also enunciated a requirement of "unlawful and exclusionary" acts to establish unlawful monopolization is belied by (i) those very opinions, which explicitly negate the need to show unlawful acts,[1] (ii) other opinions of this Court and various Circuits which reject such a requirement,[2] and (iii) leading commentators who unequivocally describe the prior controlling precedents as rejecting the rule which Kodak vainly strives to harmonize with those cases.[3] Moreover,

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[1] The confusion inherent in the Court of Appeals' opinion is further illustrated by the fact that, at a point in the opinion which is ignored by Kodak, the Court reads *Grinnell* and *Griffith* as negating the requirement of unlawful conduct in acquiring the monopoly (21a), a requirement which Kodak now urges was "mandated" by *Grinnell* and *Griffith* (Brief in Opposition, pp. 12-15).

[2] *See, e.g., Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 498-99 (1968); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946); *Greyhound Computer Corp.* v. *IBM Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *United States* v. *United Shoe Machinery Corp.*, *supra* at 345. (See also Petition, p. 21).

[3] *See, e.g.*, III P. Areeda & D. Turner, *Antitrust Law* ¶ 613 (1978): "It is clearly unlawful to achieve or maintain monopoly by a combination, by a restraint of trade violating § 1, by conduct that is immoral or predatory or otherwise not 'honestly industrial,' or by an 'exclusionary' practice." *See also* L. Sullivan, *Handbook of the Law of Antitrust* 94 *et seq.* (1977).

the Court of Appeals expressly noted that the opinion broke new ground on issues which are fundamental to Section 2 (*e.g.*, 7a, 14a, 18a, 40a, 71a-73a), and candidly rejected much of the teaching of *Alcoa* (18a-20a).[4]

Fundamental to the holding of the Court of Appeals was the determination that the perceived benefits of integration immunize from antitrust scrutiny certain conduct associated with product introduction, without regard to the surrounding market structure or the purpose or effect of the conduct (see Petition, pp. 26-31). Kodak cites no precedent supporting this view of integration or the enunciation of *per se* rules which create such enclaves of immunity for any type of conduct. Instead, it denies (*e.g.*, Brief in Opposition, pp. 8, 14) that rules of *per se* legality were urged by it or reflected in the opinion of the Court of Appeals. What Kodak dismisses as "the rhetoric of the district court" (Brief in Opposition, p. 8) is an accurate description of Kodak's reliance on such a rule in the District Court (see Petition, p. 6 n. 9) and in the Court of Appeals (see 46a n. 30). The Court of Appeals' assump-

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[4] Kodak's suggestion that *Alcoa* was merely construed and followed (Brief in Opposition, p. 13) flouts the observations of the Court of Appeals (18a-20a) and is not consistent with professional comment on the matter. Illustratively, this year's review on Recent Antitrust Developments by the Association of the Bar of the City of New York is entitled in part: "Berkey v. Kodak: The Demise of Alcoa . . . ." This is the lecture long given annually by Professor Milton Handler and to be presented this year by his partner, Stanley D. Robinson. We submit that the importance of *Alcoa*, the fact that it was decided under a statute making it tantamount to a Supreme Court opinion and its explicit approval by this Court (*see American Tobacco Co.* v. *United States, supra* at 811-14), all require that if it is to be buried, the interment be done by this Court.

tion of the lawfulness of the activities of an integrated monopolist, its failure to require factual or economic support for the proposition, its refusal to evaluate Kodak's conduct in terms of purpose, effect or market structure, its rejection of explicit jury findings and the failure to remand for further jury consideration of such matters are consistent only with a determination that the conduct was deemed *per se* lawful.[5] Contrary to Kodak's conclusory dismissal of a conflict with any other opinion or Circuit (Brief in Opposition, p. 15), in considering conduct involving the introduction of products by an integrated monopolist, and in direct conflict with the last described approach of the Court of Appeals below, the Ninth Circuit would, *inter alia,*

> ". . . allow the factfinder to consider the effects of the design on competitors; the effects of the design on consumers; the degree to which the design was the product of desirable technological creativity; and the monopolist's intent. . . ."

Transamerica Computer Co. v. *IBM Corp.,* No. C 73-1832 RHS (N.D. Cal. Oct. 18, 1979) (slip opinion at 79), applying the Ninth Circuit rule as enunciated in *Sherman* v. *British Leyland Motors, Ltd.,* 1979-2 Trade Cas. ¶ 62,784 at 78,547-48 n. 46 (9th Cir. 1979); *California Computer Products, Inc.* v. *IBM Corp.,* 1979-1 Trade Cas. ¶ 62,713 at 77,975 (9th Cir. 1979); and *Gough* v. *Rossmoor Corp.,* 487

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[5] See also Petition, p. 27 and n. 40; Kodak's statement (Brief in Opposition, pp. 7-8) that the Court of Appeals held that product introduction can only expand competition, manifestly reflects a *per se* rule (even though Berkey did not challenge the introduction of any product, but the surrounding conduct). Similarly, when Kodak there describes the Court's rejection of an explicit jury finding, which is inconsistent with its opinion, as a disagreement, it establishes that the Court was ruling on the propriety of the conduct as a matter of law, since it cannot "disagree" with a jury on a factual determination.

F.2d 373, 376 (9th Cir. 1973). (*See also Greyhound Computer Corp.* v. *IBM Corp., supra;* Petition, pp. 20-21, 25, 27 n. 41).

The brief in opposition pointedly avoids the determination by the Court of Appeals that the jury was barred from considering Kodak's decision not to give predisclosure in even the limited respect referred to in the charge, *i.e.*, as an ameliorative measure in view of other exclusionary conduct (A 265-66). (See also Petition, pp. 12-13, 29-31). That determination, undoubtedly fundamental to the setting aside of the $45,750,000 camera damage award, clearly enunciates the proposition that the withholding of predisclosure cannot, under any circumstances, be relevant to unlawful monopolization. It thus, contrary to both Kodak's denial that a *per se* rule was adopted (Brief in Opposition, p. 14) and the last described approach of the Ninth Circuit, eliminates from antitrust scrutiny a monopolist's determination as to predisclosure—even when unrelated to technical matters or advances—without regard to the surrounding market structure, purpose or effect (see Petition, p. 29, citing other precedents contrary to the view of the Court of Appeals).

On the other hand, Kodak relies (Brief in Opposition, p. 8) on matters not in the trial record[6] in support of the erroneous contention that this case involved a demand for a broad requirement of predisclosure. Kodak facilely labels "false" (Brief in Opposition, p. 8) the detailed demonstration of the limited significance of predisclosure at the trial (Petition, pp. 3, 11-13, 29-31), but points to no part of the trial or appellate record which supports Kodak's contention that (i) Berkey sought predisclosure relating to cameras (Berkey urged only that new film formats

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[6] *E.g.*, Kodak cites (Brief in Opposition, p. 8) Berkey's early answers to interrogatories (C438-43) which were never presented to the jury and do not reflect contentions made during any proceedings here relevant.

should be disclosed)[7] or (ii) it was the cornerstone of the liability claim.

2. This Court should not require further protracted and misdirected proceedings before ruling on questions of first impression relating to the film and paper overcharge claims.

Kodak conclusorily asserts (Brief in Opposition, pp. 16-17; Cross-Petition in 79-499, p. 5) that the film and paper overcharge claims ought not be reviewed at this time in view of the remand for a new trial. Notwithstanding a direction for further proceedings, this Court has repeatedly expressed its willingness to grant certiorari to review questions which are "fundamental to the further conduct of a case"[8] in order "to prevent extraordinary inconvenience"[9] and "before the plaintiff is put to the difficulties and the courts to the inconvenience . . . required under a mistake."[10]

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[7] Kodak describes as statements by Berkey's counsel matter at A265 (Brief in Opposition, p. 8) which is part of the charge and does not support a broad description of predisclosure; characterizes a statement at A413 (Brief in Opposition, p. 9) as seeking "advance notice of the system" while the statement there referenced was explicitly limited to the film and cartridge.

[8] *Land* v. *Dollar*, 330 U.S. 731, 734 n. 2 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3 (1949); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

[9] *American Construction Co.* v. *Jacksonville T. & K.W. Ry.*, 148 U.S. 372, 384 (1893).

[10] *In re Simons*, 247 U.S. 231, 239 (1918). *See also Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-53 (1964), referring to the savings to the parties and the fact that both had urged the Supreme Court to review fundamental questions before the further proceedings took place; *Larson* v. *Domestic & Foreign Commerce Corp., supra* at 685. While Kodak expresses some cryptic uncertainty as to the "decisional consequences" of the opinion (Brief in Opposition, p. 2) it does not gainsay the burdensome and confused nature of future proceedings if the decision is not reviewed.

The instant case comes before this Court on a record which reflects a full and careful jury trial of over eight months under rulings by the District Judge which limited Berkey to proof of anticompetitive conduct since 1969.[11] The directed retrial will necessarily include proof of conduct over a sixty year or more period and, *inter alia,* the difficult, time consuming and perhaps futile exercise of attempting to relate particular acts over this period to price increments during the limitations period (see Petition, p. 35 and nn. 46, 47). All of this is avoidable if the first trial was proper. All is wasted if the Court of Appeals erred, as Berkey contends in this petition, or as Kodak urges in its petition in 79-499. Ultimately, the questions involved require resolution by this Court, and Kodak does not respond to the showing (Petition, pp. 31-35) that, as the Court of Appeals recognized (71a-73a), certain of these questions had not previously been decided.[12]

Any further trial at this time would, moreover, be fraught with uncertainty in view of the inconsistencies and lack of clarity in the Court of Appeals' opinion. Illus-

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[11] Kodak's oft repeated contention (Brief in Opposition, pp. 9-10, 16-17) that the District Judge required no causal link between exclusionary conduct and the damages in film and paper is simply wrong. The charge required that damages be limited to those overcharges attributable to unlawful monopolization due to exclusionary conduct and excluded amounts due to other factors (A458-64). See Petition, pp. 15 n. 22, 18. See also Respondent's Brief in 79-499, p. 3 n. 3, persuasively refuting Kodak's description (Cross-Petition, pp. 3-4 and repeated here, Brief in Opposition, p. 9) of the anticompetitive conduct shown in the film and paper markets and demonstrating that it did not depend on product introductions.

[12] Kodak does not gainsay the applicability of the principles here involved in the pending complex and important cases cited by Berkey (Petition, pp. 22-23 n. 36). The cavalier suggestion (Brief in Opposition, p. 15) that they will somehow be correctly decided without some guidance by this Court is neither persuasive nor tenable in view of the difficulties reported by these Courts and the conflicting opinions in the field (see also p. 4 *supra*).

tratively, the Court of Appeals rejected virtually all of Kodak's challenges to the jury instructions, found that the jury could not find the camera related conduct of the integrated company exclusionary but its analogous photofinishing related conduct could have been.[13] Kodak now claims that the camera decisions apply to the film market on remand *"a fortiori"* (Brief in Opposition, p. 10 n. 11) and render the jury instructions clearly erroneous (*id.* at 17). In fact, the opinion is silent on the standards applicable to the retrial on photofinishing, whether the camera or photofinishing rulings control in reviewing the related film and paper conduct, and how, if at all, the charge is to be revised on the manner of determining if particular conduct was anticompetitive. Indeed, the burden of proof on these critical questions was specifically left open (74a n. 58).

3. Kodak's contention that its monopolies are based on salutary conduct and are socially desirable flouts the record, the jury findings and the condemnation of monopoly reflected in the Sherman Act. It thus further focuses the case on critically important issues which should be reviewed by this Court sooner rather than later.

In opposing certiorari and defending the result below, Kodak disregards the explicit and implicit jury verdicts that its monopolies are due to exclusionary conduct and artificial barriers to entry.[14] Instead it points to, as osten-

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[13] The Court of Appeals seems to be suggesting the need for some further factual determinations on the photofinishing claim although further factual determinations were not found relevant on the camera claim (see Petition, pp. 16-17).

[14] The proof also precluded Kodak's current re-argued contentions that Berkey was not an innovative camera manufacturer (Brief in Opposition, p. 5 n. 4) and that Berkey was not injured (Brief in Opposition, p. 6). Kodak's own counsel refuted the former contention (A582) and the District Judge recognized Berkey's injuries to be established beyond dispute (A1671-72).

sible facts, its assertedly salutary conduct and quality products as the reasons it has maintained its monopolies.[15] It inconsistently urges that it was inappropriate to permit the jury to consider the evidence that showed the lack of Kodak product quality or innovation (Brief in Opposition, p. 7 n. 7). The two conspiracies in violation of Section 1, as found by the jury (187a), District Judge (104a, 123a, 149a) and Court of Appeals (87a), are ignored in Kodak's "explanation" of the reason it holds a camera monopoly (Brief in Opposition, p. 3 n. 1).[16] Kodak wholly ignores that it demanded the jury whose results it now discards so completely and which are so fundamentally inconsistent with the conclusions and approaches of the Court of Appeals. (See also Petition, pp. 16, 24-25).

Kodak defends this approach, and its adoption by the Court of Appeals, by contending that testing its monopolies, under standards of *Alcoa* and similar authorities, grants judges and juries the power to arbitrarily transfer wealth (Brief in Opposition, p. 13) and bring about diversification of monopoly power (Brief in Opposition, p. 15), the existence of which it argues to be in the public interest (Brief in Opposition, p. 3 n. 1). This candid articulation of the alleged justification for the rejection of scrutiny under

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[15] *See, e.g.*, Brief in Opposition, pp. 3 and n. 1, 7, 9-10, 12-13. The contentions there made are neither true, sustainable in view of the jury verdict nor even supported by such record references as are given. All were argued to the jury at some length and their rejection should have barred repetition in this Court. Illustratively, Kodak would have this Court reject as untenable (Brief in Opposition, p. 4 and n. 2), the abundant proof of Kodak's efforts to limit the quality or efficiency of other photofinishers, in the face of explicit findings thereon by the jury (183a), District Judge (120a-21a) and Court of Appeals (56a-58a, referring to Kodak's "shoddy treatment" of photofinishers). As the District Judge observed (129a), this was a part of Kodak's scheme to erect barriers to entry by film and papers makers.

[16] Kodak has not sought review of those findings (Cross-Petition in 79-499, p. 3 n. 2).

the antitrust laws by juries, and perhaps judges, of conduct undertaken by businesses in their self-interest, abandons even a pretense of arguing that the jury verdicts were afforded proper deference. Kodak thus presents explicitly the tension, reflected in the opinion below, between trial and review of antitrust cases by traditional standards of binding fact finding as against appellate nullification based upon assumptions with respect to the benefits of integrated monopolists or other issues.

The many pending complex cases under Section 2 (see Petition, pp. 22-23 n. 36) and conflicting views of the law (see, *e.g.*, p. 4, *supra*, and Petition, pp. 20-23, 26-28, 34-35), require the resolution of these issues by this Court. If they are addressed at an early date, there is considerably less likelihood of wasted effort in the lower courts. We respectfully submit that this Court should now address: the questions raised by this case which are fundamental to Section 2 of the Sherman Act; the role of judges and juries in deciding complex cases with potential wide economic implications;[17] whether private antitrust litigation should no longer be looked upon as a salutary means of antitrust enforcement and therefore burdened with impossible standards of proof; and whether contemporary economic conditions can tolerate rules which test persistent monopolies, and their inflationary effects on price, more favorably than do *Alcoa, American Tobacco, Griffith* and *Grinnell.* Kodak's brief in opposition permits none to gainsay that the breadth of the issues here involved goes to the essence of the antitrust laws.[18]

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[17] Recently described as "one of the raging questions in the law today." *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1979-2 Trade Cas. ¶ 62,893 at 79,171 (E.D. Pa. 1979).

[18] We note the pleas of responsible commentators for guidance from this Court on antitrust issues of wide national moment. *E.g.*, January 1979 Report of the National Commission For Review of Antitrust Laws and Procedures 146-47, 156; Posner, *The Antitrust Decisions of the Burger Court*, 47 Antitrust L. J. 819, 824-27 (1978).

Conclusion

The briefs on the two petitions for certiorari addressed to the decision of the Court of Appeals confirm its own view that this is "one of the largest and most significant private antitrust suits in history" (5a). Both sides have sought review of determinations made by the Court of Appeals which were generally decided differently by the District Judge. The questions involved will ultimately have to be decided by this Court. It would be an undue burden on the judiciary and the parties, and a cruel waste, to defer those rulings to another day, while this and other extended and complicated Section 2 cases are tried and reviewed at a prohibitive cost to the courts and litigants. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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